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DSJ BOARD
To all our readers,

It is our honor to serve as Co-Editors-In-Chief of the Diversity and Social Justice Forum for the 2022-2023 academic year. We are proud to lead and be a part of an organization that is committed to implementing notions of diversity through the inclusion of a broad scope of unique perspectives, ideas, and backgrounds. To put our mission into metaphorical terms, diversity is having a seat at the table, and inclusion is having the opportunity to speak.

On behalf of the Diversity and Social Justice Editorial Board, we invite you to immerse yourself in our annual Publication, Volume VI: Our Voices: Exploring Cultural Roots and Significance.

Throughout time, historical records and scholars have had great power in documenting information and key events in many cultural groups. At times, this can lead to an accurate representation of such groups’ culture, but other times, it can lead to the development of misconceptions and prejudices. As such, it is important to recognize and consider how powerful a written record or a simple description of one’s culture can be in shaping its portrayal, outlook, and perceptions.

Our job now is to facilitate and promote awareness about the history and representation of various minority groups.

Our contribution to the mission of promoting such awareness lies within the pages of this publication. Each article represents a ubiquitous form of discrimination aimed at historically marginalized communities, and invites the reader to acknowledge how we as a collective can further mitigate discriminatory thought and practice.

We hope that this publication not only encourages you to challenge your biases, but also inspires you to immerse yourself in intersectional discourse to advocate for the implementation of diversity and inclusion in various legal spaces.

Evette Jahangiri and Simon Truong
Introduction
By Professor Kenneth Stahl

Justice is said to be blind, but the process of picking judges is surely not. According to a report by the Center for American Progress, 73% of federal judges are men and 80% are white. Of the 226 federal judges appointed by Donald Trump, 84% were white, and 76% were men.

Ironically, when President Biden promised to elevate the first black woman to the Supreme Court, Ketanji Brown Jackson, many of those who had cheered Trump’s virtually all-white male judicial nominees were outraged that race or gender could possibly play a role in the choice of the next Supreme Court justice. Several critics complained that by pre-committing to a nominee of a certain race and gender, Biden would therefore not choose the “objectively” best candidate for the job. As anyone who has ever interviewed candidates for a job knows, however, there is hardly ever an objectively best candidate and, even when there is, that is rarely the decisive consideration. Certainly Supreme Court justices have never been selected based on who is the objectively best candidate – they are selected for ideology, partisanship, personal connections, the ease with which they can be confirmed, and other factors. Even those who’ve raged about Biden’s reference to race and gender in the selection of Justice Jackson have themselves championed the use of race and gender to choose judges they perceived as closer to their own ideological predispositions.

The fraudulent notion of “objectivity” is attractive because it allows us to indulge the pretense that justice is blind, that judges resolve cases without regard to their backgrounds, ideologies and personal prejudices. This is a myth, of course. While it is popular in some circles to assert that deciding cases with vast societal impacts is simply a matter of “calling balls and strikes,” as Chief Justice Roberts stated during his confirmation hearing, the empirical evidence proves that this is not true. A recent study showed that Republican-appointed judges tend to sentence black defendants to longer prison sentences than Democratic-appointed judges do, and female defendants to shorter sentences than Democratic-appointed judges do. Another study found that white judges are four times more likely than non-white judges to throw out racial discrimination lawsuits. It seems reasonable to suppose that non-white judges are more likely to have experienced racial discrimination in their own lives than white judges have, and this experience invariably informs their perspective on the validity of racial discrimination claims.

A truly colorblind justice system is a noble and vital aspiration in a liberal democratic society, but we get no closer to that goal by pretending it has already been met when it clearly has not. Stripping away that pretense is among the many valuable contributions of organizations like the Diversity and Social Justice Forum at Chapman University Fowler School of Law. Through its activism, its scholarship, and its promotion of a robust dialogue dedicated to addressing inequality, the Forum is a powerful reminder that “identity politics” are inescapable in our justice system and that there can be no impartial system of justice without recognizing the diversity of backgrounds and perspectives we all bring to the decisions we make. I am proud to celebrate the Forum’s work, and invite you to participate in its quest for social justice.
Denis Binder is entering his 50th year of teaching. His first article, published in the California Law Review in 1971, was "Sex Discrimination in the Airline Industry: Title VII Flying High." He has published three indices of Environmental Justice Cases, and in 2017 "Some Rough Historical Parallels Between South Africa and the United States." He consulted with Cesar Chavez and the United Farm Workers in 1991. Professor Denis Binder is not a Native American, but through an unique sequence of events was the first chair, 1977-78, of the Section of Native American Rights of the Association of American Law Schools.

Chief Red Cloud
By Professor Denis Binder

“They made us many promises, more than I can remember. But they kept but one. They promised to take our land ... and they took it.”

— Mahpiya Luta

Mahpiya Luta, an Oglala Lakota Sioux, known in history as Chief Red Cloud, temporarily won a large reservation for his tribes.

Red Cloud was a warrior and a leader of the Lakota Sioux. He met with five presidents over 30 years advocating Indian rights.

Red Cloud’s War between the Plains Indians and the military from 1866-1868 established his greatness. Gold was found in Montana. The Bozeman Trail (1863-1868) from Fort Laramie to southern Montana ran through Lakota Sioux, Arapahoe and Cheyenne lands. He led a skirmishing war against travelers on the trail, high-lighted in December 1866 by killing all 81 soldiers led by Captain Fetterman.

The United States and the tribes entered into the Second Treaty of Fort Laramie. The government granted roughly them 90,000 square miles of land, the Great Sioux Reservation, including the Black Hills and the Powder River Basin. The Army closed the Trail and abandoned the forts. Red Cloud became a man of peace, living on reservations.

His famous quote is the story of Native Americans.
History and Memory

By Professor Michael Bazyler

“All wars are fought twice, the first time on the battlefield, the second time in memory.” — Viet Thanh Nguyen

I am a legal historian focused on the Second World War, and specifically how law and lawyers played a critical role in the effectuating the Nazi project to exterminate Jews. The genocide of the European Jews carries today a special name, the Holocaust.

A major part of my work involves the interplay between history and memory, or how the Holocaust is remembered, both in Nazi Germany and its allied and conquered states across Europe.

Germany, the leading perpetrator nation, has confronted its horrific past Schoolchildren regularly learn the history of how Germany facilitated the murder of 6 million Jews between 1933-1945. Basic education includes obligatory visits to the concentration camps and death camps. Today, the Federal Republic of Germany mobilizes this memory by creating a national consciousness in contradistinction to the Third German Reich, with a political structure, ethos, and constitution based upon principles of a Western liberal democracy.

Still, these national commemoration efforts undercut substantial erasures. Only in the late 1990’s did German companies start publishing investigative studies showing how they profited from the Holocaust through slave labor, theft of Jewish assets, and supply of materiel and planning that made the Holocaust possible.

The complicity of other European nations complicates this already fraught issue of commemoration. The German project to exterminate the Jews also depended on a million or more collaborators across Europe, who either went along with or participated in the genocidal murder and theft. Poland has become the particularly heated site of a memory war of how the wartime years should be taught, institutionalized, and memorialized.

Germany’s occupation of Poland was brutal; Nazis murdered an estimated 1.9 million non-Polish civilians, of a 35 million population. At the same time, 90% or 3 million Polish Jews, the largest in pre-war Europe, did not survive the war. And while Israel has recognized the selfless acts of almost 7,000 Polish Christians as “Righteous Among Nations,” this figure obscures the reality that the Polish majority either ignored or actively assisted in the arrest and murder of the Jewish minority.

It’s not hard to see why Polish nationalists want...
Poles to have been the untainted victims of Nazism, rather than as participants in a genocidal project. But fully reckoning with the past requires acknowledging its full reality.

Like most naturalized Americans, I am proud and grateful for the opportunities America has given me since I came here as a 11-year-old refugee with my parents from Communist Poland. I see this gratitude keenly echoed in my law students—many of whom arrived fleeing war, poverty, or tyranny, or who carry the trans-generational trauma of their immigrant parents.

But while Americans have dutifully acknowledged the ignobility of other nations (Exhibit 1: the U.S. Holocaust Memorial Museum), we remain reluctant to fully come to terms with our own history of African-American enslavement, a history woven into the fabric of this country’s foundations. Like the Germans, we may allow memorial projects to permutate, but grappling with that memory in concrete terms has been less forthcoming. Like the Poles, we honor—rightly—those who fought for emancipation, but we are less eager to talk about how our birth as a nation of slave-owners significantly impact our nation today.

In the second decade of the 21st century, debates rage about what parts of American history should and should not be taught to our children, what statues should be saved and which should be taken down, and how much our history of racism still drives society. The U.S. has not yet fully reckoned with its past, and so is not at peace with its memory ghosts. We wage a new civil war about the topics that animated the last civil war, not on the battlefield, but on the field of memory.
The Articles
Carrying on the Family Name: The Influence of Court Rulings and Maiden Surnames

By Tharanpreet Chahal

“It takes a great deal of courage and independence to decide to design your own image instead of the one that society rewards, but it gets easier as you go along.”

— Germaine Greer, The Female Eunuch

I. Introduction

Imagine if mainstream society and its expectations had normalized females carrying on the family name after marriage as opposed to their male counterparts. After all, the assumption that males “carry on the family name” is a complete social construction that is based on centuries of tradition.[1] There are no biological arguments that justify why men assumed the role of continuing the family name and why women, in turn, give up their maiden surnames. [2] So why is there a heavy expectation for women in traditional and modern society to take their husbands’ last names once they are married?

Custom and tradition are arguably the two main reasons women forgo their maiden names for their husbands’ names when they get married.[3] Though this occurrence may not be as prevalent now, many women change their last names for those of their husbands once they are married. However, custom and tradition are not the sole cause of this traditional structure. Court cases and various acts implemented throughout history have also contributed to the practice of women adopting their husbands’ surnames.[4] Various court rulings coerced women to change their last names once they were married based on the assumption that tradition equated to the rule of law.[5]

This article examines how past cases across the United States contributed to the prevailing idea that women should take on their husbands’ last names upon marriage in the heterosexual romantic couple context. This article analyzes a recent study that explores the prevalence of societal expectations placed upon women and their ability to decide what surname to use at the time of marriage. [6] Further, this article provides a brief history about maiden names and prevalent historical figures in North America that fought to allow women to have the choice between keeping their maiden names or taking their husbands’ surnames. Lastly, this article provides recommendations and concludes that women should have the ability to choose their paths free from the judgment and expectations of society.

II. A Brief History on Surnames and Maiden Names

A. Background

Gender norms in heterosexual romantic relationships have been resistant to change over the past several decades.[7] “Although adherence to romantic relationship traditions may appear to be
harmless, scholars have argued that many of these traditions are infused with power dynamics that afford men greater status and power than women.”[8] The tradition of wives adopting their husbands’ surnames started in a time when women did not have many legal rights and were perceived as their husbands’ property.[9]

While women around the world are legally able to retain their maiden names after marriage, custom and tradition seem to take precedent in determining whether a woman retains her surname or not.[10] In a 2017 study, when unmarried young adults were asked about their future plans, most undergraduate men and women preferred that the woman in the relationship should adopt the man’s surname.[11]

A natural connection exists between names and identity, the sexist norms brought about by tradition, and the professional implications of changing an individual’s surname.[12] Under common law, the surname that a person uses was considered that person’s legal last name.[13] However, surnames were essentially unknown in England before the ninth century. Surnames would not come into use for another 100 years.[14] This is when hereditary, or genetically transferred, surnames became the custom or law of the land when it came to surname usage.[15] Later, a person’s Christian or given name was considered more important than a hereditary name because it was given at baptism.[16] Essentially, the Christian name could be changed upon confirmation, otherwise no change was possible.[17] As stated in a widely recognized foundational document on English common law by Sir William Coke, “And this [practice] doth agree with an ancient book, where it is holden that a man may have divers names at divers times but not divers Christian names.”[18] In general, surnames were often adopted by a person or given to that person because of certain characteristics, place of birth, or even occupation. In fact, a person could accrue many surnames in one lifetime.[19]

No other aspect in society showed how important a person’s surname was than the fact that common law allowed a person to change his or her surname at will, without legal proceedings.[20] A person could simply adopt a new name and become known by that name: “Subject to certain restrictions imposed in the case of aliens, the law prescribed no rules limiting a man’s liberty to change his name.”[21] Accounts from England show upper class men took the surnames of their wives or that wives retained their surnames if they came from prominent families.[22] It was not until Henry VII passed an act establishing the parish registry that the practice of having all family members under the same surname became institutionalized.[23] Under this particular act, all deaths, marriages, and births were recorded.[24] The father’s name was used for recording purposes.[25]

Women have a long history of switching out their maiden names for their husband’s last name.[26] **Coverture** is the idea that a woman’s perception of “her legal existence as an individual was suspended under marital unity, where the legal fiction was that husband and wife are considered a single entity: which is dependent on the husband.”[27] Coverture, starting as early as 1340, idolized the belief that when a woman wed her husband, she lost every surname except *wife of* and that became her only identity.[28] During the fifteenth century, the English added another prong to the French doctrine of coverture.[29] Through scripture, the interpretation of coverture focused more on the unity of husband and wife as opposed to a husband’s power over the wife.[30]

Henry de Bracton stated that husband and wife “become a single person because they are one flesh and one blood.”[31] This idea furthered the fabled need that married women must take their husband’s surname because the sharing of his surname was a symbol of both spiritual and legal unity.[32] It became customary in seventeenth century Britain for a woman to adopt her husband’s surname out of symbolism, legality, and tradition.[33]

A woman in the United States does not lose her maiden name through marriage under civil law and her legal name does not change according to her marital status.[34] A woman could be known by her husband’s name in social circumstances, but she does not acquire his surname as her legal name upon marriage.[35] The Married Women’s Property Act was enacted in most states in the United States and in England during the nineteenth century.[36] These acts empowered women by allowing them to have control over their own property, make contracts, and
take part in business activities after marriage.[37] However, women were not granted full legal status through these acts.[38] While the passage of these acts and statutes spurred recognition of separate legal existence between husband and wife, women still adopted their husband's surnames.[39] Courts around the United States still deemed the husband as the dominant party in the marriage.[40]

However, Lucy Stone, a nineteenth century U.S. suffragist and abolitionist, was one of the earliest advocates for the ability of women to have the choice to retain their maiden names.[41] She faced challenges with legal officials upon her refusal to sign her husband's name when she tried to purchase land.[42] These legal issues forced her to seek legal counseling, which confirmed there was no law in existence that required her to purchase land under her husband's name.[43] Thus, after her marriage in 1855, Stone made a public announcement that she did not change her name when she married her husband, and she never will.[44] Her fellow activist Elizabeth Cady Stanton wrote:

"Nothing has been done in the woman’s rights movement for some time that has so rejoiced my heart as the announcement by you of a woman’s right to her name. It does seem to me a proper self-respect demands that every woman may have some name by which she may be known from cradle to grave."[45]

Therefore, custom and tradition, not common law, are the main propellants for women adopting their husband’s surnames.[46] As scholar Patricia Gorence stated, “No state statutes today specifically require that a woman assume her husband’s surname.”[47]

However, certain court rulings had other interpretations of custom versus law regarding married women and their surnames.[48] In a Massachusetts case, the plaintiff, a woman who married in 1921, registered her car in 1923 under her maiden name. Soon after, she and her husband were injured in an automobile accident where she brought an action for damages. The Massachusetts court refused to allow her to recover damages. The court’s reasoning was that the car was not properly registered and was a nuisance on the highway. The court held, as a matter of law, that after the plaintiff’s marriage her legal surname was that of her husband. So, when she registered the automobile, she did so in a name that was not hers. Given that the statute governing such matters states that a motor vehicle shall be registered in the name of its owner, the car was not legally registered at the time of the accident and so she was not entitled to recover.[49]

Before the 1970s women could not get their paychecks, passports, driver’s licenses, bank accounts, or even vote, using their birth surnames.[50] However, since 1975 there have been court rulings that make it easier for women to keep their birth names by alerting government agencies individually that one’s name is or is not changing.[51]

**B. Historical Figures That Impacted Female Surname Retention**

![Hester Piozzi and Mary Wollstonecraft](image)

1. **Mary Wollstonecraft**

Mary Wollstonecraft, daughter of a farmer, taught and worked as a governess in the mid-eighteenth century.[52] Her choice in keeping her maiden surname for her publications was incredibly unique for that time. She was one of the first documented women to have her work published using her maiden name instead of using a false male name or her husband’s name. Her use of her maiden name was not only in passing, but also used in her professional identity during a time where few women were considered to have a professional identity.[53]

2. **Hester Piozzi**

Hester Piozzi was a famed literary mind. In the eighteenth century, she petitioned to have her husband’s nephew adopt her maiden name of Salusbury.[54] She wrote to the king that “the fact that he adopted my maiden name made him my son at last; my son by adoption.”[55] Hester was one of the first women in Great Britain to petition to Parliament to pass the private act to ensure the continuation of their maiden names. However, this solution was only available and beneficial to very few wealthy women.[56] Hester’s positive outcome is a prime
example of how wealthy women had much autonomy in using their maiden surnames versus their husband’s maiden surnames. It was extraordinary that she was able to convince the king to allow her husband’s nephew to adopt her maiden surname. However, one must note how instrumental her status in the community was to her ability to convince a king to side with her viewpoint.

C. The study “Does a Woman’s Marital Surname Choice Influence Perceptions of Her Husband?” demonstrates the prevalence of societal expectations.

The article Does a Woman’s Marital Surname Choice Influence Perceptions of Her Husband? attempts to explain the stereotypes women in heterosexual relationships face when they do not take their husband’s surnames after marriage or when they break tradition. The article also examines how participants predominantly referenced “expressive” traits when describing a man whose wife retained her surname. The overarching goal of the study is to test for links between a woman’s surname choice and other people’s perceptions of her husband. Researchers conducted three studies in the United States and the United Kingdom. The goal of Study 1 was to provide initial evidence that participants readily use traits related to expressivity to describe a man whose wife retains her surname after marriage.

The overall purpose of the study was to examine how participants characterize a man whose wife retains her surname after marriage. This study showed that there were gender differences in attitudes toward the marital surname tradition. For the purposes of this study, “expressivity” is connected to passivity, warm heartedness, and an interest in pleasing rather than causing an argument to jeopardize the fate of the relationship. Expressivity is a term used to describe males with non-traditional masculinity. Findings from Study 1 give preliminary insight into how people characterize men whose wives retain their surnames after marriage. When asked to describe the man in the relationship, over half of the sample referenced expressive traits. This pattern complements research showing that women who retain their surnames tend to be associated with masculinity.

III. How Various Cases "Encouraged" Women to Take Their Husbands' Surname


Chapman v. Phoenix National Bank of N.Y. is a prime example of a court ruling that is based on traditional common law. The case is considered one of the most influential cases regarding a married woman’s surname. Chapman explored the issue of adequacy of notice. The proceeding was set aside because she brought the suit using her married name and the court insisted that it was invalid for lack of notice. The court moved to vacate the judgment, in which it was stated in dicta that:

For several centuries, by the common law among all English-speaking people, a woman, upon her marriage, takes her husband’s surname. That becomes her legal name, and she ceases to be known by her maiden name. By that name she must sue and be sued, make and take grants and execute all legal documents. Her maiden surname is absolutely lost, and she ceases to be known thereby.

B. Roberts v. Grayson, 233 Ala. 658, 173 So. 38 (1937)

Similar to Chapman, the Roberts case ruling relied heavily on tradition and custom. Roberts involved a claim against a decedent estate in which the deceased Hattie W. Jones was recognized as Mrs. J.C. Jones. The case explored whether the use of a woman’s maiden name was sufficient to give notice to that individual, despite being married. Here, the court holds that "a woman’s maiden name ceases upon her marriage, and she ceases to be known thereby."

The court notes that "Alabama has adopted the common law rule that upon marriage the wife by operation of law takes the husband’s surname." In fact, the court cited the opinion of the Nebraska Supreme Court case, Carroll v. State, 53 Neb. 431, 73 N.W. 939, 940, which meets with our approval:

"It is argued that ‘Mrs. Fred Steinburg’ was not the name of the witness, and this, being the name written on the instrument, was insufficient,—did not fulfill the requirements of the law. It must be said that, in a strict sense or meaning, this was not the name of the witness. A married woman takes her husband’s surname, and by a social custom, which so largely prevails that it may be called a general one, she is designated by the use of the Christian name, or names, if he has more than one, of the husband, or the initial letter or letters of such Christian name or names of the husband, together with the appellative
abbreviation 'Mrs.' prefixed to the surname; and all married women (there may be, possibly, a few exceptions) are better known by such name than their own Christian name or names, used with their husband's surname, and their identification would be more perfect and complete by the use of the former method than the latter.”[76]

In this context, the court was interested in maintaining a precedent that all states could follow and continue to follow when similar cases are brought to each court.


Custom and tradition were the backbone behind the court ruling in Rago v. Lipsky. Rago involves a prominent Chicago lawyer.[77] She exclusively, socially, and professionally used her maiden surname after marriage.[78] However, she was denied permission to remain registered under her maiden name. The Illinois statute provides that "any registered voter who changes his or her name by marriage . . . shall be required to register anew."[79] The court held that the statute made it mandatory for Rago to re-register under the surname of her husband.[80] The reasoning behind this decision was that it was a well-known custom for a woman upon marriage to abandon her maiden name and take the husband’s surname, which is interpreted to be used with her own given name.[81] The court further referred to the long-established custom and common law that a woman's name is changed by marriage and her husband's surname becomes, as a matter of law, her surname.[82]


Forbush v. Wallace was a class action that challenged the Alabama Department of Safety’s rule that required married women to use their husbands' surnames on their driver’s licenses.[83] The class action asserted that this requirement was a violation of the Equal Protection Clause of the Fourteenth Amendment: "The Forbush court held that the requirement that a married woman obtain a driver's license under her husband's surname found a rational basis in administrative convenience.”[84]

The administrative convenience rationale provides that the state has a legitimate interest in preventing fraud in vehicle registration along with administering its registration process in the most efficient way possible.[85] In addition, the state has a valid interest to make this process as efficient as possible.[86] Furthermore, the state does have a legitimate interest in accurately identifying people across various agencies and departments as well as an interest in preventing people from fraudulently misrepresenting themselves.[87] However, these state interests are not served by forcing married women to adopt their husband's surnames.[88] In fact, forcing married women to change their names could create the opposite effect and in turn render the identification and tracking process more difficult. In contrast, the administrative convenience test was rejected by the Supreme Court because the Court stated that the possible outcome of unequal treatment between males and females vastly outweighs the justification of convenience in Reed v. Reed, 404 U.S. 71 (1971).[89]

Historical Impacts These Cases Have Had on Women

Though the practice of women taking their husband’s last name is not governed by black letter law, common practices have continued this aged tradition.[90] This was the set precedent until a Tennessee court upheld women’s right to vote using their maiden name, courtesy of Dunn v. Palermo.[91] Prior to the 1970s, women would need to use their husband’s last names for various administrative proceedings.[92] For example, women could not get passports, driver’s licenses, or register to vote unless they adopted their husband’s last name.[93]

IV. Cases that Encouraged Married Women to Choose


In Dunn v. Palermo, the court’s reasoning exemplified and acknowledged a woman’s ability to choose whether she wanted to change her last name.[94] Rosary Palermo is a Nashville lawyer.[95] In 1973, she married Denty Cheatham, another lawyer. Ms. Palermo continued to use her maiden name professionally, socially, and for all purposes.[96] She filed a change of address with the Tennessee Registrar listing her name as Palermo after the marriage.[97] She was advised by the Registrar that she was required to register her name under her husband’s last name or have her name expelled from the registration records. When she refused to register
under her husband's last name, her name was purged from the registrar's list. The Supreme Court of Tennessee held that "a woman, upon marriage, has a freedom of choice. She may elect to retain her own surname or she may adopt the surname of her husband. The choice is hers."[98] The court also held that one's legal name is either given at birth, voluntarily changed at the time of marriage, or changed by affirmative acts as provided under the Constitution and the laws of the state.[99]


The court in *Krupa v. Green* questioned the "custom" reasoning found in previous court decisions.[100] A well-known lawyer retained her own name in professional and social settings after she married.[101] She ran for municipal court judge, which was challenged on the basis that she used her birth name on the nomination petition.[102] The court in pertinent part said:

"It is only by custom, in English speaking countries, that a woman, upon marriage, adopts the surname of her husband in place of the surname of her father. Krupa is the primary American authority cited in support of *Stuart v. Board of Supervisors*, infra, and is said to be 'the only previous American decision to approach the issue of married women's surnames from the general context of the legal history of surnames and to bring a searching common law analysis to bear upon the question.'"[103]

This case then held that no black letter law requires women to take their husband's surname. Instead, the practice happens through society's customs, traditions, and expectations. The mere questioning of the custom requiring women to take their husband's last names is significant, because it was an early case highlighting the custom.

C. *Stuart v. Board of Supervisors of Elections for Howard County*, 266 Md. 440, 295 A.2d 223 (1972).

*Stuart* acknowledged that custom and tradition should not be binding factors of law. Mary Stuart, the plaintiff, was married and registered to vote using her maiden name.[104] When she refused to register using her husband's surname, the Board canceled her registration, reasoning the necessity of accurate recordkeeping.[105] She exclusively used her maiden name, just like Rosary Palermo.[106] The Maryland Court of Appeals reversed the prior ruling.[107] The court's reasoning for this reversal was that a married woman's surname does not automatically change to that of her husband.[108] This shows that the woman, in fact, makes a clear intent to exclusively, consistently, and non-fraudulently use her birth name after marriage. Simply put, "the mere fact of marriage does not, as a matter of law, operate to establish the custom and tradition of the majority as a rule of law binding upon all."[109]


*Matter of Natale* found for the woman's choice in changing her name and that there was no written requirement that a woman must change her name upon marriage. *Matter of Natale* held that a married woman, in her request for a name change, is not limited to a choice between her antenuptial name or her husband's name.[110] The court granted a statutory name change to a married woman who had used her husband's surname after marriage.[111] She had been known by three surnames due to her mother's name change after remarriage and because of her formal adoption.[112] In reversing the trial court, the appeals courts recognized both the common law right and the statutory right of a married woman to change her name.[113] The court held that there was no requirement of a common surname.[114]

**Historical Impacts These Cases have had on Women**

In the 1970's the U.S. Supreme Court struck down a Tennessee law requiring a woman to assume the last name of her husband before registering to vote.[115] During this time the prefix "Ms." became a normalized identity, allowing women to assert their identity apart from their marital status.[116] The use of "Ms." became normalized during the second-wave feminism movement and the cultural impact of *Ms. Magazine* in the 1970s.[117] The thought behind the spelling was that "Ms." as a blend...
of Miss and Mrs., but there is also evidence that “Ms.” also derives directly from “Miss” and from “Mistress.”[118] “The 1885 citation from the Vermont Watchman, which has just come to light, provides a new link in the development of ‘Ms.’” This newspaper ad, masquerading as a news story, contrasts Ms. Parrington with Mrs. Dull, suggesting that “Ms.” is meant to abbreviate ‘Miss.”[119] In modern society, “Ms.” has indeed replaced “Miss” for all English speakers who are pairing “Ms.” with “Mrs.” to signal unmarried/married just like the Miss/Mrs. pair that it was supposed to replace.[120]

**Contemporary Impacts These Cases Have Had on Women**

Numerous milestones exist on women’s rights and marriage equality. In fact, full marriage equality finally arrived on June 26, 2015.[121] With the Supreme Court decision in Obergefell v. Hodges, marriage equality became the law of the land and granted same-sex couples in all 50 states the right to full, equal recognition under the law.[122] Some couples equated taking their married partner’s name to being reduced to a piece of property and see taking their married partner’s last name as heteronormative, patriarchal, traditional, archaic and old-fashioned.[123]

“For some, having argued and fought for marriage equality for so long, they found it difficult to explain why they would want to suddenly follow heteronormative naming conventions.”[124]

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**V. Recommendations**

Tradition and custom dominate the notion that married women must take on their husbands’ surnames upon marriage. This custom is not written within common law. In fact, many women today choose to hyphenate their maiden names with their husband’s surname once they are married. This contemporary choice for married women could stem from the fact that choices for US and UK women have expanded. More and more women today focus on their own careers out of choice or by necessity. This change sparked an evolution about the concept of identity.

Not all countries and societies follow the old tradition of changing the woman’s last name. Societies in Greece, France, Italy, Nederland, Belgium, Malaysia, Korea, Spain, Chile (and many other Spanish speaking countries) are countries where women are not expected to take their husband’s last name upon marriage.[125] Women often keep their maiden name after they get married without any societal pressure.

Women have their own identities that are not contingent on who they marry, a far cry from the thought processes of the past. Past cases have conflated the tradition and custom of a woman taking her husband’s last name with it being a matter of law, causing a widespread belief that it is legally required. On the contrary, when an aspect of society hinges on being carried on through custom and culture, it does not necessarily equate that it is carried on by the matter of law. Laws should not facilitate the outcome of ones’ identity or recognition based on societal expectations and constructions.

There is absolutely nothing wrong with a woman taking her husband’s last name, but this tradition is not for everyone. The point of this entire article is to highlight the evolution of an aged tradition that does not need to be followed if one prefers not to. No law in the U.S. requires women to change their last names upon marriage. Women should have the ability to make this choice without the societal expectations and pressures. Society should not have the dialogue that “women have earned this right…” Women do not and should not need to have to earn this right. Women’s rights are and have always been embedded in themselves as women, but society seems to take issue with this fact.

[2] Id.
[3] Id.
[5] Id.
[7] Id.
[8] Id. (internal citation omitted).

[9] Id.

[10] Id.


[12] Id.


[14] Id.

[15] Id.

[16] Id.

[17] Id.


[20] Id.

[21] Id.

[22] Id.

[23] Id.

[24] Id.

[25] Id. at 883.

[26] Erdmann, supra note 4, at 6.

[27] Id.

[28] Id.

[29] Coulombeau, supra note 1, at 3.

[30] Id.

[31] Id.

[32] Id.

[33] Id.

[34] Garence, supra note 15, at 884.

[35] Id.

[36] Id.

[37] Id.

[38] Id.

[39] Id.

[40] Id.

[41] “For example, not until 1920 with the passage of the nineteenth amendment to the U.S. Constitution were women granted universal suffrage in the United States.” Claudia Goldin, Maria Shim, Making a Name: Women’s Surnames at Marriage and Beyond, 18 J. Econ. Persps. 143, 144 (2004).

[42] Id.

[43] Id.

[44] Id.

[45] Id.


[47] Id.


[49] Id.

[50] Id. at 144.

[51] Id.

[52] Coulombeau, supra note 1.

[53] Id.


[55] Id.

[56] Id.

[57] Robnett, supra note 6, at 61.

[58] Id.

[59] Id.

[60] Id.

[61] Id. Studies 2 and 3 are irrelevant for the purposes of this article.

[62] Robnett, supra note 6, at 3.

[63] Id. (citation omitted) at 9.

[64] Id. at 31.

[65] Id. at 6-7.

[66] Id. at 12.

[67] Id.

[68] Id.


[70] Id.

[71] Id.

[72] Id.

[73] Id.

[74] Id. at 789-90.

[75] Lamber, supra note 72, at 786.

[76] Roberts v. Grayson, 233 Ala. at 660

[77] Lamber, supra note 72, at 791.

[78] Id.

[79] Id. at 791.

[80] Id.

[81] Id. at 791.

[82] Id.
[83] Lamber, _supra_ note 72, at 795.

[84] _Id._

[85] _Id._ at 797-98.

[86] _Id._

[87] _Id._

[88] _Id._

[89] _Id._ at 803.

[90] _Id._


[92] _Id._

[93] _Id._

[94] _Id._


[96] Lamber, at 780.

[97] _Id._

[98] _Id._

[99] _Id._

[100] _Id._

[101] _Id._ at 888.

[102] _Id._

[103] _Id._

[104] Lamber, _supra_ note, at 793.

[105] _Id._

[106] _Id._

[107] _Id._

[108] _Id._


[110] _Id._ at 889.

[111] _Id._

[112] _Id._

[113] _Id._

[114] _Id._


[116] _Id._


[118] _Id._

[119] _Id._

[120] _Id._

[121] _Id._

[122] _Id._

[123] _Id._

I. Introduction

Kristy and Dana Dumont were ready to start a family in 2016, after eleven years together and five years of marriage. [1] They had been preparing for years, moving to a suburban neighborhood close to a great school district. [2] The two women knew they wanted to adopt a foster child and had been looking into two tax-funded adoption centers in the area. [3] Despite their excitement, the adoption centers denied the Dumont’s services because they were a same-sex couple, which did not meet the agency’s religious requirements. [4] The Dumont’s experience was unfair and outrageous, but they had the opportunity to use other child-welfare agencies in their surrounding area. [5] Prospective parents in some other states are not as lucky. [6] For example, Michael George and Chad Lord, a same-sex couple in D.C., needed eight years of searching to finally find a child-agency that accepted them and made them feel comfortable. [7] Moreover, in states such as Nebraska and Mississippi, where religious based organizations make up more than half of the public child-welfare organizations in the state, same-sex couples seeking to foster or adopt may find they have limited options. [8]

Several faith-based child-welfare agencies have refused services for years to members of the LGBTQ community. [9] The Dumont’s experience was especially important because it invoked an outcry for change. [10] The Department of Human and Health Services (HHS) in the Obama Administration in December 2016 revised the Code of Federal Regulations, adding language prohibiting discrimination in HHS-funded programs based on sexual orientation, gender identity, or sex. [11] This new regulation, 45 C.F.R. §75.300(c), added much needed protection, [12] and was a positive step forward in ensuring that a situation like the Dumont’s would never happen again.

However, it happened again. Eden Rogers and Brandy Welch faced similar challenges several years later when they tried to foster children from Miracle Mill Ministries, South Carolina’s largest state contracted foster-care agency. [13] Miracle Mill turned away the same-sex couple because they did not meet the agency’s doctrinal statement, that “God’s design for marriage is the legal joining of one man and one woman.” [14] HHS’s regulation, 45 C.F.R. §75.300(c) should have barred Miracle Mill from discriminating against Eden and Brandy. However, HHS granted South Carolina Governor, Henry McMaster, a waiver earlier in the year, exempting South Carolina religious organizations from complying with the HHS regulation. [15] This waiver gave faith-based organizations in the state the power to discriminate against LGBTQ prospective parents. [16] By granting Governor McMaster this waiver, [17] HHS demonstrated that their regulation was not full-proof. The waiver also foreshadowed what was coming: in 2019, the Trump Administration implemented a new amendment to 45 C.F.R. §75.300(c), altogether removing the language that explicitly prohibited discrimination based on sex, gender identity, and sexual orientation. [18] This revision, which went into effect on January 12, 2021, leaves the LGBTQ community with no clear federal protection against discrimination by faith-based child-welfare
agencies.[19]

The Trump administration’s revision of 45 C.F.R. §75.300(c) was a change long coming, as conservative and religious communities have expressed concerns since the 2015 Supreme Court ruling in Obergefell v. Hodges.[20] In Obergefell, the Supreme Court’s holding that states could not deny same-sex couples the access and benefits of marriage triggered strong backlash and fear among religious communities.[21] Conservative lawmakers passed laws intended to diminish LGBTQ rights and to prevent the government from requiring religious organizations from acknowledging same-sex marriages.[22] Businesses like child-welfare agencies with religious exemption laws in place, would not risk losing government support after refusing to provide services to prospective parents who did not meet their religious beliefs.[23] The waiver given to Miracle Hill reinforced the possibility that organizations could still keep their discriminatory beliefs and retain support from the government; ten other states had exemption laws for child-welfare agencies by 2021.[24]

Religious exemption laws that permit child welfare organizations to deny services to the LGBTQ community affect LGBTQ prospective parents, foster youth, and all U.S. taxpayers. In states where faith-based agencies are the main controlling force over the placement of the state’s children,[25], prospective LGBTQ parents may find that they have few options.[26] Further, LGBTQ people are seven times more likely to adopt or foster than heterosexual couples.[27] With over 500,000 dependent children in the foster system, turning away capable parents solely based on sexual orientation is contradictory to the system’s main goal of providing children with stable homes.[28] LGBTQ youth in these systems face additional challenges, including having difficulty in finding an accepting home and facing a higher risk of abuse and maltreatment as a result of biases and lack of training from child-welfare administrators and case workers.[29] Finally, each child adopted from foster care reduces state and federal spending by almost $29,000 annually. Thus, opening the doors to more prospective parents could help taxpayers save hundreds of millions of dollars.[30]

Scholars argue that laws which allow government-funded child welfare agencies to deny services based on religious beliefs are unconstitutional under the First Amendment’s Establishment Clause.[31] They contend religious exemption laws ignore the line between church and state by allowing religious views to dictate who receives certain government services and benefits.[32] This argument has been tested by lawmakers and others in the establishment of religious exemption laws.[33] While the holdings in one of these cases prove that this argument has merit, it has not proven to be effective in bringing about change.[34] One reason behind this is that unconstitutionality of religious exemption laws comes into conflict with the 1st Amendment’s Free Exercise Clause.[35] In a recent landmark case, for example, the Supreme Court found that, as a matter of policy and as not to violate the Free Exercise Clause, the city of Philadelphia could not deny a contract with a faith-based foster care agency that refused to provide services to married same-sex couples on religious grounds.[36]

This Note argues that HHS should redraft 45 C.F.R. §75.300(c) to reinclude language prohibiting HHS-funded organizations from discriminating against LGBTQ prospective parents. This Note will focus on exemption laws as they relate to faith-based child-welfare agencies. This Note will suggest that, by revising Rule 45, HHS will curb discriminatory issues LGBTQ prospective parents face when looking to adopt from a faith-based agency. This Note will further explain how this approach is more effective compared to simply arguing that religious exemption laws are unconstitutional. Finally, this Note will discuss what HHS can do to prevent similar religious exemption waivers from reoccurring.

Founded in 1953, the Department of Health and Human Services is an executive branch department of the U.S. Federal Government, established to provide
health protections and essential human services to all Americans.[37] Programs funded by HHS are critical to family health and well-being, as HHS serves millions of families across the country and awards more than $500 billion in grants each year to provide vital health services.[38] Included in HHS’s programs are child welfare services, aiming to promote the health and safety of the nation’s children.[39] Additionally, as a federal agency, HHS has the power to guide and enact rules and regulations focused on the nation’s health and safety.[40] As demonstrated, HHS can enact regulations that combat discrimination within the organizations it supports.[41]

This Note is composed of six parts, with Part I being the introduction. Part II provides background history on the United States foster and adoption systems, focusing on the growth of religious influence in the systems and other aspects relevant to religious exemption laws. Part III contains a more detailed discussion of the current child welfare religious exemption laws in place. This section will further analyze the motivations behind these laws, as well as their impact and questionable constitutionality. Part IV focuses on a detailed background of HHS and its impact, focusing on how it has prevented discriminatory practices in the past. It argues that HHS should make a regulatory revision offering protection to LGBTQ prospective parents seeking to foster or adopt from a faith-based child agency. Finally, Part V discusses common counterarguments, such as the temporary nature of HHS regulations and the reoccurrence of religious exemptions. This part uses the recent Supreme Court case, Fulton v. Philadelphia, to propose a regulatory revision that adopts language preventing similar religious exemption law from reemerging. Part IV, the conclusion, summarizes this Note in a statement.

II. Background of United States Adoption and Foster Care Systems

(A) Public Adoption and Foster Care Systems in the United States

Foster care and the public adoption system are recent developments.[42] Public adoption began in the mid 1800s and the modern-day public foster system emerged as late as the early 1900s.[43] Before this time, adoption or foster care was handled privately; dependent children were primarily brought up through organizations or private arrangements.[44] During the period before the Revolutionary War, for example, dependent children often became apprentices for others in the community, receiving care and training in exchange for their work.[45] Private orphanages, most of which were religious-based, also started to emerge.[46] At this time, state governments had a minute role in child-welfare, especially compared to the role they play today.[47]

State involvement in foster and adoption services only became prominent around the late nineteenth century.[48] State government started to take direct accountability for their state’s dependent children, opening government-run orphanages and financing private orphanages already in place.[49] However, with no united infrastructure, the child-welfare system was still predominantly run by private institutions.[50] The New Deal sparked the first bout of true state involvement in the child-welfare system; parents began to approach government agencies, requesting foster care or childcare services.[51] The modern foster care system was formalized by the end of the 1930s. Private organizations by 1944 had taken more of a back-seat role, as child welfare had shifted mostly to a centralized, government-led system.[52] However, faith-based religious organizations continued to grow and provide services during this time, albeit mostly in the private sector.[53]

The history of foster care and adoption services in the United States illustrate two important findings: (1) that it is a very recent development and not yet an American staple; and (2) religious organizations have had different levels of involvement in governmentally funded child-welfare services. The novelty of government-based child-welfare services in America is relevant because it gives one reason why flaws remain in the system, such as governmentally funded agencies turning away parents like the Dumonts. As the Dumonts’ experience has proven, the child welfare system has struggled to remedy the conflicts that arise when religious child welfare organizations and state governments start working under the same system.

(B) What the Foster Care Systems Look Like Today

Family law is jurisdictional, but the structure of adoption and foster care systems is very similar state-by-state. In general, there are two primary systems that make up the child-welfare sphere in the United States.[54] First, there is the private system, where parents can voluntarily place their children up for adoption through a private organization or directly with the family of their choice.[55] Second, there is the public system, established to meet the needs of dependent children under the state’s care.[56] This Note focuses on the public system. Unlike the
private system, where children are usually placed voluntarily, children seldom enter the public system by the choice of their parents but are instead removed from their families by State agencies or orphaned without any other close relatives.[57] The number of children in the public adoption and foster care system today is massive. HHS’s most recent survey showed more than 632,000 children had spent time in foster care in 2020, with nearly 407,000 children in foster care daily.[58] 

Private organizations can provide services in both the public and private systems.[59] If, however, private organizations choose to operate in a public system, they must work directly with the state government.[60] These relationships are governed by contracts, detailing that the state government will fund the private organization in exchange for their adoption and foster care services.[61] These services include finding and certifying foster parents and establishing congregate care for children under state protection.[62] Private organizations can be religious or non-religious, but private religious organizations are the dominant source in child welfare services in many parts of the country.[63] For example, Catholic Charities USA, deeming their work necessary as part of their religious mission, is known to offer adoption and foster care services to many states throughout the country.[64] 

This Note focuses on child-welfare services as they relate to the public system because, as a publicly funded system, the government should not be funding agencies that directly discriminate based on sex or gender identity. Government agencies further have the power to remedy discriminatory practices through rules and regulations. Since this Note focuses on governmentally funded services, it will not discuss whether HHS should permit discrimination by faith-based child-welfare agencies not receiving government funding.


(A) State Religious Exemptions for Child Welfare Organizations

Eleven states to date have passed religious exemption laws that permit state-licensed child-welfare organizations to refuse to provide services to children and families who conflict with their religious beliefs.[65] The laws and measures vary by state, but each paints a narrative that the government is victimizing these religious organizations with unfair state action. The exemption laws accomplish this narrative through anti-discriminatory language.[66] Mississippi’s law, for example, forbids the government from “take[ing] any discriminatory action against a religious organization...on the basis that such organization has provided or declined to provide any adoption or foster care service, or related service” based on religious beliefs.”[67] By using this language, these child-placing organizations ignore the fact that they themselves are discriminating against those who conflict with their religious beliefs. The other side will argue that forbidding agencies to use this kind of language is discriminatory in itself, because it prohibits the agencies from exercising their full religious beliefs. However, engaging in religious discrimination in this case is justifiable, since it would directly protect large communities of people and the religious agencies themselves would suffer no direct harm.

Religious exemption laws for child-welfare agencies vary in the kinds of beliefs they protect and the kinds of child-welfare related activities that they supply. Most religious exemption laws apply to any religious belief an organization may have.[68] However, Mississippi and Texas exemption laws protect specific religious beliefs, of which are written in the statutes.[69] Furthermore, most state religious exemption laws focus only on child placement, protecting organizations that refuse services to prospective parents.[70] Some states cover even more services, including refusal to assist abused or neglected children (Mississippi) and to assist in family reunification services (Texas).[71] The extensive language of religious exemption laws in states like Mississippi and Texas give religious organizations the flexibility to deny a vast number of services—services that individuals and couples may desperately need—to those who conflict with their religious beliefs.[72] 

Another important distinction is that religious exemption laws in all states but Alabama cover government-funded agencies. Alabama law ensures that faith-based child welfare organizations can maintain state licenses but does not explicitly require the state to fund organizations denying services based on religious beliefs.[73] In contrast, the ten other states’ exemption laws prohibit the government from denying funding to organizations that discriminate
based on its religious beliefs.[74] These laws extend even further, prohibiting the governments from taking legal action against discriminatory faith-based organizations and from preventing these organizations' participation in state contracts and programs.[75] These exemption laws require government actors to continue to fund organizations with discriminatory practices.

Congress has not taken a stance in support or opposition to religious exemption laws. Federal lawmakers have been unsuccessful in their attempts to pass bills on both sides of the issue.[76] The federal administrative state has taken a more active role, with HHS becoming a dominant player on the issue.[77] HHS was the first to deny discrimination based on sexual orientation and gender identity by faith-based child-welfare organizations in 2016.[78] The Obama Administration’s 2016 regulation proved that HHS had the power to protect the LGBTQ community in organizations for which they provide funding. HHS’s ability to make rules is relevant for Parts IV and V of this Note, which discuss how HHS should implement a new anti-discriminatory regulation.

Religious exemption laws for child-welfare agencies are also in response to Project Blitz, or “Freedom for All.” Project Blitz is an association of various Christian groups, all with the mission “[t]o protect the free exercise of traditional Judeo-Christian religious values and beliefs in the public square” and “[t]o properly frame the narrative and the language of religious liberty issues.”[86] Project Blitz views the United States as a “Christian nation” and believes that the country should extend religious freedom to those who practice Christianity.[87] Project Blitz has proposed a number of model bills to state legislators. Included in these bills are child welfare-religious exemption laws.[88] Within the past few years, Project Blitz has been a dominant force in introducing religious exemption laws and amassing state-legislator support.[89] Project Blitz leaders gave enthusiastic support to Mississippi’s religious exemption law, calling it the “Mississippi missile.” Other religious exemption bills for child-welfare agencies have been either based on Project Blitz or justified by Project Blitz’s model bills.[90]

(C) Negative Effects of Religious Exemption Laws for Child Welfare Agencies

One unanswered question is whether homophobia played a role in the emergence of these laws because most exemption laws avoid directly speaking about LGBTQ rights.[79] Government officials tend to focus on the desires of the faith-based child welfare agencies, which claim that these laws are necessary for the organizations to keep operating.[80] However, some lawmakers have indicated that their states’ exemption laws have emerged in response to LGBTQ hostility, same-sex marriage, and the Obergefell holding. Mississippi legislators noted that Obergefell usurped [state's] right to self-governance and ha[ving] mandated that states must comply with federal marriage standards – standards that are out of step with the wishes of many in the United States and that are certainly out of step with most Mississippians.[82] A Mississippi legislator argued the state should stop issuing marriage licenses;[83] another legislator described the decision as “in direct conflict with God’s design for marriage as set forth in the Bible.”[84] A Kansas state legislator in a debate on the use of the religious exemption used the term “homosexual agenda” and described the LGBTQ movement as “totally intolerant.”[85]
organizations provide foster care and only three will provide services to same-sex couples. Exemption laws in states like Nebraska have the potential to prevent LGBTQ prospective parents from being parents all together. Even if LGBTQ prospective parents find other agencies to work with, religious exemption laws may still force these individuals to endure the humiliation of being turned away, often under the implication that their lifestyle makes them unfit to be parents.

Religious exemption laws can also have harmful effects on youth in the child-welfare system. The number of children in the foster care system is disproportionately larger than the number of prospective parents willing to foster or adopt. About 20,000 youth age out of the foster system every year without being adopted. Children in foster care may miss out on an opportunity to have a safe and loving home. While the numbers may be small in terms of how many additional children will end up finding homes if the exemption laws were not in place, the individual impact on those who do find homes is significant regardless. Moreover, children of color and LGBTQ youth make up most of the youth in the foster care system, leading these groups to suffer the most if there is limited prospective parent availability. LGBTQ youth already face additional challenges in the foster-care system, such as having difficulty in finding parents willing to adopt, facing greater risk of abuse, and becoming homeless at a higher risk.

Some religious exemption laws go beyond just child placement and extend to other child-related services. For example, a Michigan law provides that a child placement agency "shall not be required to provide any services" that conflict with its religious beliefs. Michigan's law thereby allows religious child-welfare agencies to discriminate directly against LGBTQ youth. Under the Michigan statute, the organizations could refuse to provide a variety of much needed services, such as aid for abused or neglected LGBTQ children. Similar exemption laws in other states mention directly other services the organizations need not provide. Under Mississippi's religious exemption law, faith-based child-welfare organizations can refuse to use correct gender pronouns and can knowingly place LGBTQ youth in homophobic or transphobic households. Further, some religious exemption laws extend to family reunification services, adding additional suffering and trauma, as these laws can prevent or delay parents from regaining custody of their children. By providing the legal avenue of preventing separate families from reuniting, these laws may needlessly keep children in an already overcrowded foster system.

(D) Case Law Regarding Religious Exemption Laws for Child Welfare Agencies

State religious exemption laws for child-welfare agencies have not often been challenged in court. However, advocacy groups have begun to take a closer look at these laws and challenges have started to find relevancy in the court system. Two lawsuits related to state religious exemption laws for child-welfare organizations have made it to court. The first suit was a direct challenge to Mississippi's religious exemption law under the Establishment Clause and the Equal Protection Clause. The case, Barber v. Bryant, challenged religious exemption laws in their entirety rather than focusing specifically on those directed at the child-welfare system. The district court granted the plaintiffs a preliminary injunction, reasoning that the plaintiffs could succeed in establishing unconstitutionality on both the Establishment Clause and Equal Protection Clause claims. Under the Establishment clause claim, the court reasoned that Mississippi law favored certain religious beliefs over others and burdened third parties who are not able to receive the law's protections. Under the Equal Protection Clause claim, the court held that the law lacked rationality, as the state's Religious Freedom
Restoration Act was already established for the purpose of protecting religious freedom.[113] However, the Fifth Circuit ordered the case dismissed for want of standing. The pre-enforcement challenge did not establish the agency had denied any service under the law.[114] The plaintiffs had also not alleged any specific plans to seek services covered by the law.[115] Since the plaintiff’s did not meet the standing requirement, the Fifth Circuit dismissed without discussing the merits of the Establishment Clause or Equal Protection claims.[116] The Mississippi exemption law went into effect after the Fifth Circuit ruling and has not since been challenged.

A second case, Dumont v. Lyon, was brought by the Dumonts and four other Michigan LGBTQ prospective parents who were refused services because of their sexual orientation.[117] The plaintiff, as with the Barber plaintiffs, alleged that the State’s practice of contracting with religious-based organizations that discriminate against prospective parents violates their protected rights under the Equal Protection Clause and the Establishment Clause.[118] Contrary to the Fifth Circuit in Barber, the district court in Dumont found that the plaintiff’s claims had standing.[119] In reaching its decision not to dismiss, the court focused on the plaintiff’s claims that religious exemption laws erode the separation between church and state and are motivated by anti-gay stigma.[120] After the district court granted standing to the plaintiff’s argument, the intervenor filed a new federal suit against Michigan.[121] The court then granted the plaintiffs, which included a religious agency, a preliminary injunction.[122] Michigan than admitted it was bound by Fulton and agreed to allow the religious agency to continue providing services.[123] However, Michigan promised to change its anti-discriminatory policies.[124]

Barber proves that constitutional challenges with standing can be held up in court. However, cases like Barber are scarce. No case has yet created new legal precedence. In Dumont, for example, despite the case settling with Michigan pledging to curb its discriminatory practices, Michigan’s religious exemption law is still in place today.[125] In fact, the agreement reached by the Dumont settlement agreement is currently being challenged in Michigan district court as a violation of the child-placement agencies free exercise, equal protection, and free speech rights.[126] The free exercise of religion is a reason why constitutional challenges to religious exemption laws have not had a strong impact.[127] Thus, rather than relying on the Supreme Court to establish a new legal precedent, a more effective approach to curbing this issue is to have HHS implement a new anti-discriminatory regulation. This Note discusses how the HHS can compose language that would prevent the regulation from falling under a free exercise, equal protection, or free speech claim.


(A) Background on HHS

The United States Department of Health and Human Services, established in 1952, is a cabinet-level executive branch department of the United States Federal government to “enhance the health and well-being of all Americans, by providing for effective health and human services and fostering sound, sustained advances in the sciences underlying medicine, public health, and social services.”[128] HHS’s motto is “to enhance the health and well-being of all Americans.”[129] Across its 11 operating divisions, HHS currently administers 115 programs, including but not limited to social service programs, civil rights and healthcare privacy programs, disaster preparedness programs, and health related research.[130]

The Administration for Children & Families (ACF) is the division of the HSS focused on promoting the economic and social well-being of families, children, and communities.[131] The ACF program aims to “encourage strong, healthy, supportive communities that have a positive impact on quality of life and the development of children.”[132] The Children’s Bureau in the ACF is the first federal agency in the U.S. Government to focus exclusively on improving the lives of children and families.[133] The Children’s Bureau partners with federal, state, tribal, and local agencies to improve the well-being and health of children and families.[134] Its annual budget of almost $8 billion provides support and guidance to
programs that focus on: (1) strengthening families; (2) preventing neglect and child abuse; and (3) ensuring that every child has a permanent family or family connection.[135] The Children’s Bureau includes child-welfare services in its funded programs. These services connect to the agency’s basic mission to improve a child’s overall safety and well-being. A recent survey made by the Congressional Research Service (CRS) showed the Children’s Bureau administers most federal child-welfare programs with services that reach over 400,000 children annually.[136] The Children’s Bureau’s wide reach emphasizes its extensive impact over the health and safety of youth in the child-welfare system. Not only does this fact emphasize the power HHS can have over these systems, but it also speaks to the dangers that may arise if the Children’s Bureau is unable to protect its children – the one thing HHS established the Children’s Bureau to do.

(B) Impact of HHS on curbing discriminatory issues

HHS has had a history of curbing discriminatory issues in the organizations it funds and supports. HHS has rule-making powers, providing guidance on federal law, policy, and program regulations. The HHS Office for Civil Rights (OCR) enforces nondiscrimination regulations that apply to all services and programs receiving HHS federal funding.[137] The OCR also enforces nondiscrimination provisions of other laws as they apply to activities and programs receiving HHS financial aid.[138] The OCR has enacted nondiscrimination provisions across various HHS departments, including but not limited to Education,[139] Federally Assisted Health Training Programs,[140] and Homelessness services.[141] For example, HHS has recently proposed a change to section 1557 of the Patient Protection and Affordable Care Act (PPACA) that explicitly prohibits discrimination “on the basis of race, color, national origin, sex, age, or disability.”[142]

HHS has used its rule-making powers to explicitly issue regulations that bar discrimination by child-welfare agencies. The Obama administration in 2016 revised 45 C.F.R. 75.300(c) to read “It is a public policy requirement of HHS that no person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs and services based on non-merit factors such as...gender, identity, or sexual orientation.”[143] The final rule explicitly forbade discrimination based on sexual orientation and gender identity by child-welfare services that receive federal funding.[144] However, the South Carolina governor cited the Free Exercise Clause and received a waiver to this rule.[145] Then, in 2019, the Trump administration rewrote the rule, pulling back all protection based on sexual orientation and gender identity.[146]

HHS is vocal today in its desire to combat discrimination within the organizations it supports. For example, HHS announced on November 2018, 2021, that it was planning to take action to prevent discrimination in its programs.[147] HHS announced through the ACF and OCR actions to further equality “all people, irrespective of their sexual orientation, gender identity, and religion.”[148] These actions were in response to the waivers given to South Carolina, Texas, and Michigan under the prior administration, all of which waived nondiscrimination requirements based on religious objections.[149] HHS said in its release that these waivers were “inappropriate and unnecessary” and that HHS must commit to not condoning “the blanket use of religious exemptions against any person or blank checks to allow discrimination against any persons, importantly including LGBTQ persons in taxpayer-funded programs.”[150] HHS Secretary Xavier Becerra also stated that “with the large number of discrimination claims before us, we owe it to all who come forward to act, whether to review, investigate or take appropriate measures to protect their right. At HHS, we treat any violation of civil rights or religious freedoms seriously.”[151] The Secretary’s statement indicates that HHS will be an active force in combatting discrimination in its programs. However, his statement does come with a wrinkle: HHS still must
take all claims of religious freedom seriously, as dictated under the Religious Freedom and Restoration Act (RFRA). [152] HHS will therefore continue to look to RFRA and will determine on a case-by-case basis if a religious exemption is valid. [153] Becerra’s statement highlights that HHS cannot dispel all religious exemption laws, but suggests that HHS will have a tough time finding the validity in exemption laws that discriminate based on one’s gender or sexuality.

(C) Proposal: HHS should redraft rule 45 C.F.R.$75.300(c) to reinsert anti-discriminatory language toward the LGBTQ community

The Trump Administration’s revision of 45 C.F.R. 75.300(c) illustrates the power that HHS regulations have; the administration would have felt no need to revise the rule if it had no effect. Since these regulations hold such power, it would be in this administration’s best interest to revise 45 C.F.R. § 75.300(c) to include similar language adopted during the Obama administration. In redrafting, the HHS should look to Becerra’s recent statements and the recent Supreme Court decision in Fulton v. Philadelphia for guidance. HHS should then be able to prevent faith-based child-welfare agencies from using the Religious Freedom Restoration Act when arguing for a religious exemption. Revisions should prevent waivers like the one given to Governor McMaster from reemerging. The specific language that should be incorporated in the new rule is discussed in the next section of this Note.

V. New Rule and Counterarguments

(A) New Rule Preventing Religious Exemptions for Child-Welfare Agencies from Reemerging

The first step in revising 45 C.F.R. § 75.300(c) is to add language directly protecting individuals based on sex and gender identity. HHS can pull the same anti-discriminatory language used by the Obama administration in issuing the rule in 2016. [154] HHS should also add language that prevents the reemergence of religious exemption laws. Using Fulton and the Religious Freedom Restoration Act for guidance, HHS can carefully craft language that will frustrate any change of religious exemption laws for child-welfare agencies from reemerging.

The Religious Freedom Restoration Act (RFRA), is a 1993 federal law that was established to ensure that interests in religious freedom are protected. [155] The law mandates that strict scrutiny should be used in determining whether religious freedom has been violated and that the “Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability.” [156] However the law provides two exceptions: (1) the burden must be necessary for the “furtherance of a compelling government interest”; and (2) the rule is the least restrictive way in which to further the government interest. [157] Therefore, RFRA allows local governments are allowed to deny religious exemptions so long as there is a compelling government interest [158] and the interest is furthered in the least restrictive way.

Fulton is a case in which a faith-based child welfare agency with discriminatory practices sued the City of Philadelphia for refusing to renew their contract. The City attempted to meet RFRA’s threshold by listing three compelling interests: “Maximizing the number of foster parents, protecting the City from liability, and ensuring equal treatment of prospective foster parents and foster children.” [159] The Court found that these compelling interests did not meet RFRA’s threshold requirement because the City was not specific; rather than explaining interests for enforcing their exemption laws, the city should have focused on compelling interests in denying contracts with that child-welfare agency specifically. [160] If the city had re-focused their argument to explain specifically why the child-agency in question should be denied religious exemptions, then the outcome of Fulton may have been different. Courts have found a compelling interest exists in remedying the present effects of past discrimination in which the government was involved or acted as a “passive participant.” [161] Thus, HHS can show that its practice of permitting religious exemption laws has led to discriminatory practices, the effects of which are still present today.

HHS can use the “compelling interests” language dictated in RFRA and Fulton. The rule should read something like:

“It is a public policy requirement of HHS that no person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs and services based on non-merit factors such as age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation. Recipients must comply with this public policy requirement in the
administration of programs supported by HHS awards. In addition, it a compelling interest of the government to remedy the present effects of its own past discrimination caused by its permissance of religious exemption laws for child-welfare agencies. For this reason, religious exemption laws for child-welfare agencies are not allowed. Finally, as not to burden the rights granted under the Free Exercise Clause, no other exemptions for any reason are allowed.”

(B) Temporary Nature of HHS regulations

As an executive branch department of the United States Federal Government, leadership within HHS depends on the federal administration.[162] For this reason, organization within HHS will change every time a new president takes office.[163] This leads to a common question: what is the point of making HHS regulatory amendments, if the amendments are just going to end up changing? The legislative back and forth of 45 C.F.R. § 75.300(c) only emphasizes this conundrum; after its enactment in 2014, 45 C.F.R. § 75.300(c) had been amended in both 2016 and 2021, during the Obama and Trump administrations respectively.[164] However, despite the temporary nature of HHS regulations, they still have a great impact during the years they are in place.

HHS anti-discriminatory regulations can be temporary, but federal administrations only change every four to eight years. HHS’s regulations remain in place and can still make a positive impact on the communities it is trying to protect until they are changed. Hundreds of thousands of children are in the public foster care system, of which only about 15% get adopted annually.[165] An estimated two million LGBTQ people are interested in adoption.[166] Opening the doors to a large pool of prospective parents who were once denied access will give more dependent children the opportunity to have loving and stable homes.[167] HHS regulations, albeit temporary, still have the potential to bring foster children and LGBTQ prospective parents together.[168]

Further, HHS anti-discriminatory regulations can change public thought and inspire future anti-discriminatory regulations. Religious exemption laws have indirect implications, as they require state and local government actors to continue to fund organizations with discriminatory practices.[169] By continuing to give financial support and religious exemptions, state and local governments legitimize discrimination. Not only does this response increase discrimination generally in that state, but it also influences other states to make religious exemption laws of their own.[170] Albeit temporary, anti-discriminatory regulations preventing religious exemption laws within the child-welfare system will let the public know that the government does not view LGBTQ discrimination as legitimate but rather as a practice that should be stopped.[171] This has the power to inspire further anti-discriminatory action, as the LGBTQ community and other minority groups will feel more encouraged to continue to fight for their equal rights across the United States.[172] Federal lawmakers can use the legal precedent used in this new HHS anti-discriminatory regulation to prevent religious exemption laws in other publicly funded agencies. Overall, while HHS structure may change, its impact has the potential to extend years into the future.

V. Conclusion

Religious exemption laws for child-welfare agencies have impacted LGBTQ prospective parents, foster children, and social ideology. The Department of Health and Human Services has the power to protect and regulate governmentally funded programs. Therefore, the government should revise 45 CFR § 75.300(c) to re-include language that directly prohibits the discrimination of individuals based on sex and gender identity. However, to prevent similar religious exemption laws from happening again, the government should focus on the discriminatory effects of religious exemptions, and how the governments’ past actions of supporting these discriminatory laws has led to present discrimination today. By adding that there is a compelling interest of the government to remedy the present effects of past discrimination, 45 CFR § 75.300(c) lays out a fair argument in prohibiting religious exemptions all together, even when Free Exercise claims or Free Speech claims are raised. Overall, one thing is clear when composing anti-discriminatory regulations: The language matters most.


[4]Id.
[7]Id.
[11]45 C.F.R. 75.300(c)–(d) (2019) (“It is a public policy requirement of HHS that no person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs and services based on non-merit factors such as . . . gender, identity, or sexual orientation.”).
[15]Id.
[16]Id.
[17]Id.
[22]Spoto, supra note 3, at 298.
[23]Id.


[32] See e.g. Id. at 71 (“When government agencies contract with faith-based organizations that discriminate in performing a government function, they violate the Establishment Clause, which mandates separation of church and state and bars states from stipulating religious criteria as a prerequisite to receiving services.”).


[34] Barber v. Bryant, 193 F. Supp. 3d 677, 698–702 (S.D. Miss. 2016), rev’d, 860 F.3d 345 (5th Cir. 2017) (holding that a couple turned away from a child-placement agency has standing to sue under the Establishment and Equal Protection Clause).

[35] Fulton, infra note 36, at 1882; see also Sch. Dist. of Abington Twp., P.A. Schempp, 374 U.S. 203, 222–23 (1963) (“The Free Exercise Clause does not withdraw from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions there by civil authority.”).


[38] See Letter from Kyle Rojas Legleiter, supra note 12.


[40] Id.

[41] See 45 C.F.R. 75.300(c)–(d), supra note 11.

[42] See Spoto, supra note 3, at 303

[43] See Brief History of Adoption in the United States, https:// adoptionnetwork.com/adoption/history-of-adoption (last visited Apr. 9, 2022); see also RYMPL, infra note 44, at 63–64.

[44] See Spoto, supra note 3, at 303


[46] Id. at 19.
[48] Id.
[49] Id. at 20 (analyzing the shift from the private to the public sphere).
[50] See Spoto, supra note 3, at 303 (“In the 1920s, the child welfare infrastructure was still quite diffuse and predominately private rather than governmental”).
[51] Id. at 63-64.
[52] Id. at 64 (summarizing the split between private and government agencies).
[56] Id.
[57] Id. (describing situations which may lead to a child entering foster care).
[59] See Spoto, supra note 3, at 305.
[61] See, e.g., Id.
[62] While some private organizations focus only on recruiting and finding potential foster parents, others directly provide forms of group care for children under state custody. See, e.g., Id.
[66] See MICH. COMP. LAWS ANN. § 722.124e(3), (7)(a) (defining an “adverse action” to include “discriminating against the child placing agency” and forbidding such action “on the basis that the child placing agency has declined or will decline to provide any service” due to its “sincerely held religious beliefs”); TEX. HUM. RES. CODE ANN. § 45.004(1) (stating that state governments “may not discriminate or take any adverse action against a child welfare services provider” based on a refusal to provide services “that conflict with, or under circumstances that conflict with, the providers’ sincerely held religious beliefs”); ALA. CODE § 26-10D-5(a) (stating that a state cannot “refuse to license or otherwise discriminate or take an adverse action against any child placing agency due to the agency’s sincerely held religious beliefs”); S.D. CODIFIED LAWS § 26-6-39 (prohibiting the state from “discriminating against or taking adverse action against a child-placement agency” for refusing to provide a service “that conflicts with, or provide any service under circumstances that conflict with the agency’s written sincerely-held religious belief or moral conviction”).
[68] See, e.g., MICH. COMP. LAWS ANN. § 722.124e(3) (stating that protection is extended based on “sincerely held religious beliefs contained in a written policy, statement of faith, or other document adhered to by the child placing agency”); ALA. CODE 26-10D-5(a) (covering objections based on “sincerely held religious beliefs of the child placing agency”); OKLA. STAT. ANN. Tit. 10a, § 1-8-112 (protection placement refusals that “would violate the agency’s written religious or moral convictions or policies”); S.D. CODIFIED LAWS § 26-6-39 (covering service refusals based on a “conflict with the agency’s written sincerely-held religious belief or moral conviction”).
[69] See MISS. CODE ANN. § 111-62-3 (2020) (“The sincerely held religious beliefs or moral convictions protected by this chapter are the belief or conviction that: (a) Marriage is or should be recognized as the union of one man and one woman; (b) sexual relations are properly reserved to such a marriage; and (c) Male (man) or female (woman) refer to an individual’s immutable biological sex as objectively determined by anatomy and genetics at time of birth”); TEX. HUM. RES. CODE ANN. § 45.004 (West 2019) (specifically protecting religious refusal to “provide, facilitate, or refer a person for” abortion or birth control).
[70]See, e.g., OKLA. STATE ANN., Tit 10a, § 1-8-112(A) (protecting a child welfare agency’s refusal to “perform, assist, counsel, recommend, consent to, refer, or participate in placement”) (emphasis added); KAN. STATE ANN. § 60-5322(b) (stating that “no child placement agency shall be required to perform, assist, counsel, recommend, consent to, refer or otherwise participate in any placement of a child for foster care or adoption”) (emphasis added).

[71]MISS. CODE ANN. § 11-62-17(5) (2020) (including right to refuse services such as “[a]ssisting abused or neglected children” and “[a]ssisting kinship guardianships or kinship caregivers”); TEX. HUM. RES. CODE ANN. § 45.002(3) (West 2019) (including “counseling children or parents” and “serving as a foster parent” in list of services that agency has right of refusal).

[72]Spoto, supra note 3, at 309 (“organizations in Mississippi and Texas [have] greater flexibility to deny service to LGBTQ individuals or others who do not comport with the organization’s religious beliefs.”)

[73]See ALA. CODE § 26-10D-5.

[74]See MICH. COMP. LAWS ANN. §722.124e(7)(a) (prohibiting “any action that materially alters the terms or condition of the child placing agency’s funding, contract, or license”); 2018 S.C. Acts 361; H. 4950, 2018 Gen. Assemb., 122nd Sess., § 38.29 (S.C. 2018); S.D. CODIFIED LAWS § 26-6-37 (stating that adverse action includes denial of funding and contracts).

[75]See KAN. STAT. ANN. § 60-53-22(d), (e), (h) (forbidding denial of participation in government programs and civil fines or other civil action); N.D. CENT CODE ANN § 50-12-07.1 (prohibiting government refusal of grants or contracts); OKLA. STATE ANN. tit. 10a, § 1-8-112(C), (D) (prohibiting government refusal of “any grant, contract, or participating in a government program” in addition to civil actions); VA. CODE ANN. §63.2-1709.3(C), (D) (forbidding denial of “any grant, contract, or participation in a government program”).


[78]45 C.F.R. 75.300(c)–(d) (2019).

[79]See e.g., MICH. COMP. LAWS ANN. § 722.124e(1) (West 2020) (leaving out any specific language relating to LGBTQ-rights).

[80]See, e.g., Hannah Weikel, South Dakota Governor Signs Religious Adoption Protections, ASSOCIATED PRESS (Mar. 10, 2017), https://apnews.com/article/87f07bd2cc0c4607bf00238d8160b119 (describing the concern that “the same thing [would] happen in South Dakota” similar to when “[r]eligious agencies in Massachusetts, Illinois, California, and Washington D.C. ended adoption services after states passed non-discrimination laws that include sexual orientation”).

[81]See Barber v Bryant, 193 F. Supp. 3d 677, 693 (S.D. Miss. 2016) (“Mississippi’s legislators formally responded to Obergefell in the next legislative session.”) rev’d on other grounds, 860 F.3d 345 (5th Cir. 2017).

[82]Id. at 691-92.

[83]Id. at 692.

[84]Id.


[87]Derek Beres, What is the Ultimate Goal of ‘Project Blitz,’ the Christian Nationalist Movement, BIGTHINK (Feb. 26, 2020), https://bigthink.com/the-present/project-blitz/ (“To this day, many Americans believe we live in a Christian nation – that such a reality should be as obvious as Judaism in Israel.”).


[89]See Katherine Stewart, Opinion, A Christian Nationalist Blitz, N.Y. TIMES (May 26, 2018) https://www.nytimes.com/2018/05/26/opinion/project-blitz-christian-nationalists.html (“[M]ore than 70 bills before state legislatures appear to be based on Project Blitz templates or have similar objectives.”); Kristian Hernandez, Pratheek Rebala, Nathaniel Carey & Mike Reicher, Bills Supporting Religion-Based Rejection Turning Parents Away from Adoption Agencies, USA TODAY (June 10, 2019, 6:00 AM), https://www.usatoday.com/story/news/investigations/2019/06/10/adoption-agencies-latest-front-religious-freedom-fight/13590722001 (stating findings that show that, over the past decade, five hundred bills have
been composed in response to Project Blitz’s legislation models; of these bills, more than sixty were passed).


[92]See Evans, supra note 26; see also Spoto, supra note 3, at 305

[93]See National Foster Care & Adoption Directory Search, supra note 6 (listing Adoption Consultants, Inc., Child Saving’s Institute, and Holt International as child-welfare organizations that will provide services).


[95]See Julie Compton, LGBTQ Tennesseans are ‘saddened,’ ‘disappointed’ by new adoption law, NBCNEWS (Feb. 17, 2020) https://www.nbcnews.com/feature/nbc-out/lgbtq-tennesseans-are-saddened-disappointed-new-adoption-law-n1137086 (... “which means these prospective parents will need to do their research, make phone calls, risk the humiliation of rejection…”)(emphasis added).

[96]See The AFCARS Report, supra note 58 (citing that there were over 400,000 children in foster care during 2020, only 25% of which ended up getting adopted).


[98]Id.


[100]See, e.g., MISS. CODE ANN. § 11-62-17(5) (2020) (defining “adoption or foster care services” to include “social services provided to or on behalf of children,” included “[a]ssisting abused or neglected children”); TEX. HUM. RES. CODE ANN. § 45.002(3) (having a similar definition of services to that of Mississippi).

[101]MICH. COMP. LAWS ANN. § 722-124e(2) (West 2020) (providing that a child placing agency “shall not be required to provide any services” that conflict with its sincerely held religious beliefs) (emphasis added).

[102]Id.

[103]Id.


[107]For example, North Dakota’s exemption law was passed in 2002, 2003 N.D. Laws 418 (codified as N.D. CENT. CODEANN. §50-12-07.1 (2019)), and that law has not been challenged in court.


[110]See Id. at 696.

[111]Id. at 722-744.

[112]Id. at 716 (“[The Mississippi Law] constitutes an official preference for certain religious tenants. . . . Christian Mississippians with religious beliefs contrary to § 2 become second-class Christians. Their exclusion . . . sends a message ‘that they are outsiders, not full members of the political community, and an
accompanying message to adherents that they are insiders..." (quoting McCreary Cnty. v. ACLU of Ky., 545 U.S. 844, 860 (2005)).

[113]Id. at 710 ("Under the guise of providing additional protection for religious exercise, it creates a vehicle for state sanctioned discrimination on the basis of sexual orientation and gender identity. It is not rationally related to a legitimate end.").


[115]Id. at 357.

[116]Id. at 352.


[118]Id. at 720.

[119]Id. at 722. However, the court held that there were no grounds for taxpayer standing. Id. at 730.

[120]Id. at 736, 741-43.


[122]Id.

[123]Id.

[124]Id. at 455; Stipulation of Voluntary Dismissal with Prejudice at 8, Dumont v. Gordon, No. 17-cv-13080 (E.D. Mich. Mar. 22, 2019), https://www.aclu.org/legal-document/dumont-v-gordon-settlement-stipulation ("Whereas, the Contract and the Subcontracts include a non-discrimination provision mandating that contracted CPAs comply with the Department's non-discrimination statement prohibiting discrimination 'against any individual or group because of race, sex... gender identity or expression, sexual orientation....' In the provisions of services under contract with the Department (the "Non-Discrimination Provision").")


[129]Id.


[131]See What We Do, supra note 39.

[132]Id.


[135]Id.


[138]Id.


[142]View Rule, OFFICE OF INFO. AND. REG. AFF. (Apr. 1, 2022) https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=2021044&RIN=0945-AA17 ("Section 1557 of PPACA prohibits discrimination on the basis of race, color, national origin, sex, age, or disability under any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsides, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under title I of the PPACA.").

[143]See 45 C.F.R 75.300(c)-(d) (2016)

[144]Id.


strengthen-civil-rights.html.

[148]Id.
[149]Id.
[150]Id.
[151]Id.
[152]Id.
[153]Id.
[154]See 45 C.F.R. 75.300(c), supra note 11.
[155]42 U.S.C. §2000bb(b) (“The purposes of this Act are – (1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened....”).
[156]Id. (“The purposes of this Act are .... (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.”).
[157]Id. (“The Congress finds that .... (2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise; (3) governments should not substantially burden religious exercise without compelling justification...”).
[160]Id. at 1881 (“The question, then, is not whether the City has a compelling interest in enforcing its non-discrimination policies generally, but whether it has such an interest in denying an exception to CSS.”).
[165]See The AFCARS Report, supra note 58 (citing that in the year 2020, 407,493 children were in the foster system and 57,881 ended up being adopted that year).
[167]See Spoto, supra note 3, at 315 (“By restricting the pool of potential parents, these laws potentially make it more difficult for all children in the foster care system to find homes.”).
[168]See Moreau, supra note 30 (citing reports from Texas and Michigan that show that the number of foster and adoptive homes working with licenses child placement agencies has decreased by nearly 40 and 20 percent respectively after the enactment of religious exemption laws for child-welfare agencies.).
[170]See supra note 20 (The dates of all ten state exemption laws are right after the similar exemption was made in South Carolina).
[172]See Spoto, supra note 3, at 317 (“[Religious exemption laws] send a message that discrimination by child welfare organizations against LGBTQ individuals is acceptable to, or even encouraged by, the state.”).
We celebrate Thanksgiving with an image of kumbaya between the Pilgrims and the Mashpee Wampanoag Native Americans. The Pilgrims celebrated their harvest with the Natives. The Native Americans looked upon the settlers with wary eyes. Armed conflicts quickly ensued between the Powhatan Confederacy and Virginia colonists in 1610 and the Pequots and the Massachusetts Bay colonists in 1636. Chief Opechancanough led the Powhatan Confederacy against the British settlements in Virginia from 1622-1646, when he was captured and then murdered by a guard.

The Thanksgiving festival followed the earlier harvest during a failed experiment in socialism by the Pilgrims. They established collective ownership of the land with communal farmland and harvest sharing. The hard workers lost their enthusiasm when they realized their efforts would be shared with “slackers.” The land was then divided into individual portions for the colonists. The next harvest was successful.

The history of America is one of friendship, hostility, treachery, and blind neglect to the Native Americans. The American settlers from the East Coast to the West Coast displaced the Native Americans, who fought with and against the Americans in several wars, including the French and Indian War, the Revolutionary War, the War of 1812, the Civil War, Red Cloud’s War and the Great Sioux War. The Indian conflicts lasted four centuries from 1609-1924 with atrocities, brutalities, depravity and massacres on both sides. Whether friend or foe, the Native Americans almost always ended up on reservations, often with limited natural resources, an imposed cultural and lifestyle change, and a corrupt Indian agent. The ending of armed hostilities did not resolve America’s Indian problem.

The early settlers faced a forbidding wilderness on the east coast. They worked their way through the forests and over the Appalachian Mountains to spy the vast Ohio Territory and the Northwest Territory.

Under the Royal Declaration of 1763, the British forbade settlement in the Ohio Territory, a lesser cause of the Revolutionary War, to minimize friction with the Native Americans west of the mountains.

Independence opened the West to settlement. Even George Washington became a speculator in Ohio lands. A series of treaties with England, France, Mexico, Russia and Spain granted Florida, the Great Plains, the West, and Alaska to the United States. The cry soon became Manifest Destiny. Neither harsh environments nor Native Americans could stop the inexorable westward expansion to the Pacific Ocean, Hawaii, and the Philippines.

The American People, an amalgam of immigrants from throughout the Old World, flooded into America. Nothing would stand in the way of Manifest Destiny - not the wilderness, the British, the mountains, burning deserts, frozen plains, or the Native Americans. The American people mastered the landscape and conquered the Native Americans.

Rivers were bridged, dammed, diverted, and tunneled. Mountains were cut, blasted, and tunneled. Wetlands were drained, filled, and dredged. Fossil fuels and minerals were mined, drilled, and pumped. America was spanned by wagon trails, canals, steel rails, and asphalt. Environmental protection was not a consideration.

The Far West was initially settled for its resources, especially mineral resources, of which the 49ers and the California Gold Rush are best known in American history. Every western state had a mineral, and thus mining, boom. Native Americans were displaced from their lands.

Chief Red Cloud was a great chief of the Lakota Sioux. He successfully fought the U.S. Army—including the 1866 “Fetterman Massacre” in which an 81-man detachment of soldiers was wiped out compared to only 14 casualties of the combined Northern Cheyenne, Lakota and Arapahoe Native Americans—a precursor a decade later to the Battle of
the Little Bighorn.

The United States then entered into The Fort Laramie Treaty on April 29, 1868 with the Arapahoe, Lakota, Northern Cheyenne and other bands. The Treaty granted the tribes the Black Hills and other lands for their "undisturbed use and occupation" as the Great Sioux Reservation. The United States "solemnly[agreed]that no unauthorized persons shall ever be permitted to pass over, settle upon, or reside in[the]territory."[1] The Treaty further provided that the treaty could not be abrogated, or the reservation reduced, without being "executed and signed by three quarters of the adult male Indians."[2] The Black Hills are sacred lands to the Sioux.

The June 25, 1876 Battle of the Little Bighorn was a consequence of discovering gold in the Black Hills. General George Armstrong Custer led an expedition into the Black Hills in 1874, six years after the Treaty of Fort Laramie, where gold was found. A wave of miners and settlers poured into the Black Hills. The United States revoked and breached the Fort Laramie Treaty; the reservation was no more.

A commission offered the Sioux $6 million or $400,000 annually in exchange for the mineral rights. The Sioux asked for $70 million and got zero. Indeed, the federal government stripped the Sioux of their treaty and granted off-reservation hunting rights.

Congress on August 15, 1876, passed the "Sell or Starve" Act, which stated that all aid was to be cut off to the Sioux until they relinquished the Black Hills and hunting rights.[3] A new agreement was reached with 10% of the males. Congress in 1877 enacted the 1876 agreement into law. The Indian Claims Commission held the "Sell or Starve" Act was an uncompensated exercise of eminent domain. The Indian Claims Commission awarded damages of $17.1 million plus 5% interest retroactive to 1877.

The Court of Claims affirmed the Commission's decision. The Supreme court quoted the Court of Claims conclusion: "A more ripe and rank case of dishonorable dealings will never, in all probability, be found in our history, which is not, taken as a whole, the disgrace it now pleases some persons to believe."[4]

The Lakota Sioux, Northern Cheyenne, and Arapahos united. They won the Battle of the Little Bighorn but lost the war. George Armstrong Custer was revered as a martyr for over a century for his bravery in Custer's Last Stand. Anheuser Busch distributed 150,000 heroic posters of Custer's Last Stand to bars. The lithograph was a nonfactual depiction of the battle, cementing the image of a heroic Custer.

Not so today. Custer is remembered for an earlier massacre at Washita River on November 27, 1868, where his 7th cavalry killed women and children of a peaceful Cheyenne winter encampment. Custer's Last Stand is now officially the Little Bighorn Battlefield National Monument.

The public image of America's Native Americans through the 1960's was essentially negative as Hollywood usually portrayed Indians as villains in scores of movies and TV shows. America's youths often played Cowboys and Indians. As a side note, the villains in Hollywood westerns were usually attired in black while the good guys wore white.

President Andrew Jackson signed and implemented the Indian Removal Act of 1830, fulfilling a 12-year desire to forcibly remove the tribes of the Southeast, the Creeks, Choctaws, Seminoles, Chickasaws, and Cherokees to Indian Territory, now known as the state of Oklahoma. Thousands died in the forced marches on what became known as the Trail of Tears.

Forced resettlement was a consistent theme with the Native Americans through the 20th Century, usually to reservations and often away from their home ranges and the settlers. The reservations could be created through treaties or by executive order.[5]

A split in America existed over the fate of the Native Americans. Many in the West thought, "The only good Indian is a dead Indian." An example is the 1864 proclamation by Colorado's Territorial Governor, John Evans. He called for citizens to kill Indians and seize their property.

The East respected the Indians as "Noble Savages" defending their lands. The compromise was to throw them onto reservations, out of sight – out of mind,
while forcing them to change their culture and lifestyle. Ironically the “Cowboy West” after the Civil War treated Black cowboys fairer than other occupations.

A scorched earth policy accelerated the demise of the Plains Indians with the near extermination of the buffalo, a critical food source whose hides were used as clothing and tenting. 31 million buffalo were slaughtered in a two-year period. The bison were shot for sport by passengers on the transcontinental trains, by buffalo hunters, fur traders, and as a matter of military policy. The Army correctly believed that killing the buffalo would deprive the Plains Indians of food, forcing them onto reservations.

The Comanches fell to superior firepower in the U.S. Army and state forces, especially the Colt Revolver and the Spencer Repeating Rifle. The Natives suffered from another handicap from having their tribes scattered initially. Tribes had traditionally fought each other, and thus unifying them as one to fight the White Man was difficult. The few times with Pontiac and Tecumseh in the East and Sitting Bull, Crazy Horse, and Red Cloud in the West were anomalies. The scattered tribes faced unified armies of soldiers.

Red Cloud is quoted late in life as saying, “They made us many promises, more than I can remember. But they kept but one…they promised to take our land…and they took it.”[6]

First General William Sherman and then General Phil Sheridan commanded the Army in the Indian Wars in the West after the Civil War. General Sheridan wrote about the fate of the Indians in his 1878 Annual Report of the General of the U.S. Army. They sent the Indians to reservations with promises of religious instructions and supplies of food and clothing. He remarked these promises were not kept. He continued:

“We took away their country and their means of support, broke up their mode of living, their habits of life, introduced disease and decay among them, and it was for this and against this that they made war. Could anyone expect less? Then, why wonder at Indian difficulties?”[7]

The Europeans and Natives exchanged diseases. Lord General Jeffrey Amherst is widely believed to have authorized British soldiers to give smallpox-contaminated blankets to the Indians. The historical record to date is inconclusive. However, the North American Indians had no resistance to many European diseases, especially cholera and smallpox which decimated the Native Americans throughout North America and the Caribbean.

Alcohol, “Firewater,” was also devastating to the Native Americans. An example is Ira Hayes, a Pima Indian, one of the six Marines and sailors who raised the flag on Iwo Jima in the famous second staged photo. Ira became a hero. Yet he suffered from post-traumatic stress disorder and turned to alcohol. He died on January 24, 1955, from exposure and alcohol poisoning.

The District Counsel of the Seattle District of the Army Corps of Engineers hired me in 1976 to prepare a legal memo on the rights of the Colville and Spokane Indians caused by the construction of Grand Coulee Dam on the Columbia River. The Colville Reservation is on the western side of the Columbia River. The Spokane Reservation lies on the confluence of the Columbia and Spokane Rivers. The Colvilles are not a traditional tribe, but 12 bands thrown together on one reservation.

![Chief Joseph](image)

One of the bands is Chief Joseph’s Nez Perce Indians. Chief Joseph is a legend in Native American history. His band fled the Nez Perce Reservation in Idaho, seeking refuge in Canada. The military chased Chief Joseph and his band over 1,000 miles, finally forcing them to surrender in Montana 40 miles from the Canadian border. They were not returned to their reservation but exiled to the Colville Reservation.

Chief Joseph said:

“We gave up some of our country to the white men, thinking that we could have peace. We were mistaken. The white man would not let us alone.”[8]

Another Chief Joseph quote, which I have on a poster, says:

“Let me be a free man, free to travel, free to stop, free to work, free to trade where I choose, free to choose my own teachers, free to follow the religion of my fathers, free to talk, think and act for myself…”[9]

Grand Coulee Dam was damaging to both
reservations, taking some of their lands and destroying their fishery resource. The dam was considered too high, with 350 feet of head to build a successful fish ladder. Its reservoirs flooded the then traditional fishery of Kettle Falls just as The Dallas Dam on the Lower Columbia flooded Celilo Falls.

The Corps of Engineers constructed the large Chief Joseph Dam 51 miles below Grand Coulee Dam. The Chief Joseph Dam’s purposes were to generate electricity and re-regulate (modulate) the large discharges from Grand Coulee. It cut off another salmon stream.

The federal government is legally a trustee for the Indian Reservations. Thus, the government acting through the Department of the Interior and Bureau of Indian Affairs is charged with protecting the best interests of the beneficiaries. The Bureau of Reclamation, which was building Grand Coulee, is also in the Department of the Interior. The Department had a substantial conflict of interest. It subordinated the rights of the Indians to whom it owed a trustee’s duty, to its power-generating Bureau. Based on the agency correspondence, it appears that the same government attorney may have been on both sides of the conflict. The federal agencies simply tried to figure out how many trees would be cut, acres taken for the reservoir and a loss of fishery resources to which figures were attached. The calculated amount was in the low 5 figures. The tribes were neither asked to consent nor able to contest the project.

The Colvilles and Spokanes ultimately received compensation from the government. Congress in 1940 granted the needed lands on the Colville and Spokane Reservations to the federal government. It authorized the Secretary of the Interior to determine the “just and equitable compensation for the tribal lands taken.”[10] The Secretary awarded $63,000 to the Colvilles and $4,700 to the Spokanes.[11] Congress appropriated an additional $330,000 in 1978 to compensate the Colvilles for the loss of their fisheries. Congress ratified in 1978 an agreement between the federal government and the Colvilles under the Indian Claims Commission Act to pay them a lump sum of $53 million and $15,250,000 annually from the sale of power from Grand Coulee.

A subsequent settlement with the Spokanes provided $17,800,000 and $12,800,000 for the next four years. Additional payments of $6 million annually for 10 years and then $8 million annually thereafter.

Clair Evans, Chairwoman of the Spokane Tribe, aptly said “Financial compensation is a semblance of justice, but we will never be as we were in the past.”[12]

The Grand Coulee saga is not an isolated instance of ignoring tribal rights. The Mandan, Hidatsa and Arikara were forced in 1870 onto the Fort Berthold Reservation, a small part of their original lands. The government completed the Garrison Dam in 1953, flooding over a quarter of their remaining lands, leaving many members dislocated.

Another example is President Theodore Roosevelt’s creation in 1908 of the 18,000-acre Bison Reserve–part of the effort to bring back the buffalo. It was carved out of the 1.25 square mile Flathead Indian Reservation of the Confederated Salish and Kootenai Tribes. Congress restored the Bison Range to the tribe on December 27, 2020.

These examples of the federal government’s treatment of Indian lands are illustrative. It held legal title to the lands and ignored its trust relationship to the tribes. The government did as it wished with the lands: dams and reservoirs, railroads, highways, reserves, and divestitures without meaningful Indian consent. It adjusted reservation boundaries as it wished.
The settlers/homesteaders through the Great Plains and West were attracted by cheap land, either homesteading directly from the federal government or through intermediate owners, such as the transcontinental railroads with federal land grants. The federal government obtained dominion over the western lands through treaties with England, France, Mexico, Russia, and Spain. The question arose over the aboriginal rights of the Native Americans.

The United States then obtained legal “title” to the lands through treaties with the individual tribes and bands who under British law had “aboriginal rights.” The United States assiduously acquired tribal lands by force, peaceful treaties, or Congressional edict, but did not feel bound by the terms and conditions of the treaties. The ink was barely dry on some treaties before the United States breached them. Some tribes were simply displaced from their lands absent treaties.

The Native Americans did not own land in the Anglo-American sense. Land was communal, but with shifting boundaries depending on the vicissitudes of the tribes. For example, the tribes of the Pacific Northwest entered into a series of treaties with Territorial Governor Isaac Stevens in the 1850’s. They deeded hundreds of thousands of acres, retaining their traditional hunting and fishing rights. The Northwest tribes needed a series of judicial decisions over a century later to enforce their treaty rights.

These provisions were repeatedly violated over the next 180 years. Native American property rights were frequently ignored and treaties were broken. The roughly 11 million acres that were given to the land grant colleges came from 250 tribal lands on a formula of 30,000 acres per representative in Congress. The states had discretion in determining the lands set aside for the new public universities. These had been Native American lands.

The federal government vacillated between assimilation/termination and self-determination/reservation policies with the Indians.

President Washington said in his first term: “The Government of the United States are determined that their Administration of Indian Affairs shall be directed entirely by the great principles of Justice and humanity.”

Such was not to be! The onslaught of settlers into Ohio Territory resulted in armed resistance by the Indians. President Washington dispatched General “Mad” Anthony Wayne to fight the Indian forces which had defeated two earlier armies. General Wayne ultimately prevailed at the Battle of Fallen Timbers on August 20, 1794, in Maumee, Ohio, near Toledo. The Northwest Territory was opened to settlement.

Some reservations were blessed with natural resources, such as the Navajos with coal, ten reservations with oil and gas, the Colvilles with timber, and the Aqua Calientes in Palm Springs with land and water. Most reservations were resource-poor.

The states in much of the Twentieth Century treated Indian fishing and hunting rights, at best, on the same basis as non-Indians. They often discriminated against the Native Americans.

Indian policy underwent a 180-degree change over the past six decades. The President, Congress, and federal courts, including the Supreme Court, recognized the rights of Native Americans and prioritized tribal hunting and fishing rights over state regulation and non-Indian fishermen and hunters. The hunting rights extend to off-reservation sites as long as the treaty creating the reservation included off-reservation traditional hunting and fishing rights.[15] Fishing disputes were rare for several decades until the salmon runs drastically decreased due to a combination of habitat loss and a series of dams that disrupted migration through the dams. The joke was that during the peak salmon runs in the past one could walk across the Columbia River on the backs of the salmon.

I taught at the University of Puget Sound from 1975-78. Federal judges, especially Judge George Boldt in Seattle, issued a series of decisions recognizing the fishing rights of the tribes.[16] The Indian treaty rights
were subsequently affirmed by the Supreme Court.\[17\]

I remember two bumper stickers from the time:

“1776 King George III; 1976 Judge George Boldt”

“Save the Salmon; Can Judge Boldt”

The Supreme Court recognized Indian water rights in the 1908 case of Winters v. United States.\[18\] The Court held that when the federal government created the Indian reservations, the intent was that the reservations could become self-sufficient and self-reliant, which necessitated water rights with a priority date of the creation of the reservation. Indian tribes also still retain a degree of quasi-sovereignty.

The treaties were one-sided and often breached by the United States. The Native American signatories were usually illiterate. Private bills were introduced in Congress to rectify the wrongs. Congress enacted the Indian Claims Commission Act of 1946 to resolve the land claims. The tribes were to be compensated with money—not land. The Commission settled 342 claims for $848,172,606.62 by 1978 when outstanding claims were transferred to the Court of Claims.\[19\] Not all claims were settled under the compensatory statute.

As we mentioned earlier, the Sioux received a $17.5 million judgment in 1979 with 5% interest over the years, amounting to $105 million. The Sioux rejected the award, seeking return of their lands. The award continues to draw interest, up to about $1 billion today.

Other tribes received specific Congressional legislation. For example, the Puyallup Tribe of Indians Settlement Act of 1989 awarded the tribe $162 million in land, money, economic development, and fishery enhancement. Congress in 1971 enacted the Alaska Native Claims Settlement Act. The various Native organizations received 44 million acres of land and $963 million to settle the Alaskan claims in exchange for which aboriginal land claims were extinguished.

The reservation system was a “short-term” fix to end the armed conflicts between the Native Americans and the United States. It did not resolve issues of tribal and individual Native American rights, jurisdiction, sovereignty, cultural and religious rights, voting rights, and economic self-sufficiency. The Native Americans on the reservations were deprived of their traditional lifestyle, sovereignty, lands, culture, and religion. The Ghost Dance was banned. Their children were often taken away from their parents and sent to Indian Boarding Schools, where they were "Americanized." The schools had high disease and mortality rates. The students were barred from speaking their native languages. The native Americans in the early years on the reservations needed a pass to go off the reservation.

Furthermore, they were not citizens of the United States.

Assimilation seemed the seductive answer. The Indians would become full citizens with all the rights and responsibilities of citizens of the United States. The government would free itself from the responsibility and burdens of managing the reservations.

The great commentator and humanist H. L. Mencken wrote, “For every complex problem there is an answer that is clear, simple and wrong.” Forced assimilation was a clear and simple solution that was grievously wrong.

Congress struggled since the late 1880’s to establish Native Americans Rights in the background of the reservations. Reconciling assimilation and reservations is as challenging as squaring a circle. Many of the attempts have been disastrous.

Congress enacted the Dawes Act (the General Allotment Act) in 1887, assimilating the Native Americans into western society. The statute provided that communally held tribal lands would be allotted to individual tribal members. The presumption being that allottees would learn western farming techniques. The statute also prohibited the retention of traditional Native culture. The United States sold surplus lands.

The Dawes Act was a disaster. It provided for the patent of allotments in fee simple in 1906 to non-tribal members; i.e. Whites. The intent was assimilation. Native Americans lost 90 million acres of land, from 138 million acres in 1887 to 48 million acres in 1934 being impoverished.

Congress halted allotments in 1934 in the Indian
Reorganization Act. The statute granted some self-determination powers to the Native Americans and tribes. It provided for tribal constitutions and by-laws.

Congress enacted House Concurrent Resolution 108 and Public Law 250 (P.L. 250) in 1953. The House Bill initiated a formal policy of termination. Tribal autonomy would be abolished. Indians would now be subject to the same laws as non-Indians. Native Americans were to become full citizens of the United States on an equal basis with non-Indians. The act further provided for the additional sale of tribal lands to non-Indians.

P.L. 250 two weeks later extended state jurisdiction over several reservations, stripping both the federal government and tribes of criminal jurisdiction. Traditional tribal systems of criminal justice would be ended. Jurisdiction today is a crazy-quilt pattern, depending on the state and the reservation.

The result was that over 100 tribes and bands were terminated. 13,263 tribal members lost their tribal affiliations. Over 2.5 million acres of trust lands were devised.

Congress passed the Indian Relocation Act in 1956, another attempt at assimilating Native Americans into the greater American society. It offered jobs and housing for tribal members who left their reservations for urban centers. The results were disappointing. Both employment possibilities and housing were poor.

A major segment of the Civil Rights Act of 1968 is The Indian Civil Rights Act of 1968, which extended most of the Bill of Rights to Native Americans in Indian Country.

Congress enacted the American Indian Religious Freedom Act of 1978, which restored freedom of religion to the Native Americans.

The rights of Native Americans greatly changed in the late 1960’s. The African American Civil Rights Movement started in the 1950’s. The Native American Civil Rights Movement began in the late 1960’s. The American Indian Movement (AIM) was founded in 1968 by activists who sought to improve the plight of urban Indians and then expanded nationally with an activist civil rights agenda.

NARF, the Native American Rights Fund, was founded in Boulder, Colorado two years later. NARF adopted a litigation route for Native American rights, highlighted by its eastern land claims cases. Several eastern tribes had entered into treaties with Connecticut, Maine, Massachusetts, and Rhode Island in violation of the Non-Intercourse Act. The Maine and Rhode Island claims were ultimately settled with the extinguishment of aboriginal land claims.

President Johnson in 1968 signed the Indian Civil Rights Act, which extended the Bill of Rights to the Indians.

Alcatraz was a federal prison island in San Francisco Bay. The government closed the prison and then announced Alcatraz was surplus property. IOAT, “Indians of All Tribes” occupied Alcatraz on November 20, 1969, claiming a legal right under the Treaty of Fort Laramie to “all retired, abandoned, or out-of-use” federal property for the Indians who previously occupied it. They occupied the island for 19 months ending on June 11, 1971. President Nixon was unwilling to forcefully remove the Native Americans. He increased the budget of the Bureau of Indian Affairs by 225%, doubled funds for Indian Healthcare (still a major problem today), and established the Office of Indian Water Rights.

The President recognized the existing situation was intolerable and had to end. He sent the “Message from the President of the United States Transmitting Recommendations for Indian Policy” on July 8, 1970: “The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions.”[20]

He called for the end of the termination policy:

“This policy of forced termination is wrong, in my judgment, for a number of reasons. First, the premises on which it rests are wrong. Termination implies that the Federal government has taken on a trusteeship responsibility for Indian communities as an act of generosity toward a disadvantaged people and that it can therefore discontinue this responsibility on a unilateral basis whenever it sees fit.”[21]

He explained the “special relationship between Indians and the federal government is the result instead of solemn obligations which have been entered into by the United States Government.”[22]

The 1971 Senate Concurrent Resolution 26 formally terminated the termination policy. Many terminated tribes regained tribal status. Tribes have also been able to reacquire some of their former lands.

Congress increasingly recognized the rights of Native Americans and the tribes. The Clean Air Act of 1990 recognized the rights of tribes. EPA was to treat
tribes the same as states.

Many reservations opened untaxed “smoke shops” selling alcohol and tobacco at a significant cost advantage. They have since moved into Indian casinos, some of which were highly successful, at least prior to Covid-19. The Indian Gaming Regulatory Act[23]was enacted in 1988, fostering Indian casinos.

A country cannot be a true democracy until the vote is extended to all citizens, regardless of race, sex, religion, or ethnicity. The Native Americans had difficulty acquiring voting rights.[24] States usually denied them the right to vote because they were non-citizens of the United States. Individual tribes were granted the right to vote, but no general franchise existed.

Congress in the 1924 Indian Citizenship Act attempted to resolve the issue. The statute provided: “All non-citizen Indians born within the territorial limits of the United States, be, and they are hereby declared to be citizens of the United States.” [25]

However, several states demurred and continued to deny Indians their voting rights. Congress finally resolved the issue in the Voting Rights Act of 1965.[26]

“No voting qualification or prerequisite to voting, or standard, practice, or procedure, shall be imposed or applied by a State, or political subdivision in a manner which results in a denial or abridgment of the right...to...vote on account of race, color, or language minority status.” [27]

The statute was prompted by the Southern discrimination against African Americans. However, Congress broadly defined “language minority status” to include American Indians, Asian Americans, Alaskan Natives and those of Spanish Heritage.[28]

quality in the delivery of health services to Native Americans.[29]

Congress has increasingly recognized tribal sovereignty. The 1990 Amendments to the Clean Air allowed tribes to develop air quality management plans and implement and enforce their rules in Indian Country.[30]

The Archeological Resources Protection Act of 1979 protected federal archeological sites and objects, many of which were Native American. Congress followed in 1990 with The Native American Graves Protection and Repatriation Act to require the repatriation of human remains and cultural items held by the federal government and museums receiving federal funds to the tribes and Native Hawaiian organizations. Many museums have repatriated cultural items to tribes, albeit slowly.[31]

Section 106 of the National Historic Preservation Act of 1966 requires federal agencies to consider the effects of undertakings they propose to carry out, license, permit, or fund on historic properties,[32] which can include properties of religious and cultural significance to Indian Tribes and Native Hawaiian organizations.

Congress took 150 years of struggle and conflicting legislation, alternating between periods of termination and self-determination. The current status allows Native Americans to retain their tribal rights on recognized reservations as well as possess the full rights of American citizens. The reservations are neither as desolate as a century ago nor an oasis today.

Severe poverty still exists as does federal underfunding of the reservations’ needs. Proper sanitation is missing on reservations. The latest attempt to do right is the $1.2 trillion infrastructure bill signed by President Biden on November 15, 2021. It provides $11 billion in benefits for Indian Country, including $3.5 billion for the Indian Health Service and additional funds for water projects. About $2.6 billion is for water and sanitation projects.

The Supreme Court on July 9, 2020, issued the opinion of McGirt v. Oklahoma. Justice Gorsuch, writing for the majority, held the state of Oklahoma lacked criminal jurisdiction over McGirt on reservation land. The 1830 removal of the Southeast tribes on the Trail of Tears pursuant to treaties declared the Creek Nation would be self-governing. [33] Congress never formally “disestablished” the reservation territory. The lands should therefore be treated as Indian lands for criminal jurisdiction. Perhaps as much as half of Oklahoma might thereby remain Indian Territory.

[2]Id. at 376.


[14] Antoine v. Washington, 420 U.S. 194 (1975). The Court held treaties were to be construed in favor of the Indians. Id at 199.


[21]Id.

[22]Id.


[25]Id. at 7.


[33] The affected tribes are the Cherokee, Chickasaw, Choctaw, Creek (Miccosi) and Seminole.
DSJ Annual Symposium
Keynote Address
**Introduction**

With the overturn of Roe v. Wade here in the United States and the COVID-19 pandemic still seriously affecting folks everywhere in the world, whether or not we ALL still see it as a priority—with monkeypox, with Ebola, and the parade of horrible that goes on and on—we are at a crossroads, not only in terms of these specific issues but what they are showing us about the commitment, or lack thereof, of our governments, but also of the rest of us, to doing something about it.

To try to help frame this conversation, which will focus a bit on both COVID-19 and abortion, I would like to say a few things about health and about human rights that seem key. Health is political. But so are human rights. Even as human rights are meant to transcend politics, the erosion of rights protections in the name of public health that we have seen in the past few years, both here in the United States and in the rest of the world, is nothing, if not political. It is also a reflection of the inequalities within and across all of our societies—fault lines that have always been there but somehow, it seems, may not have been seen by everyone quite so clearly. This is a public health emergency, but it is equally a human rights emergency.

A key lesson the last few years have taught us is that for those of us privileged enough to be in these conversations, we also have to be willing to situate ourselves in these conversations in ways that perhaps were not as stark before, especially a white, cisgender woman like myself who lives in Los Angeles, who claims to be engaged in global health. We have to genuinely acknowledge and address our own positions and our own privilege that allow us to be in these conversations.

**The Basics: Health and Human Rights**

In contextualizing human rights, it is important to recognize that human rights as we know them today—for whatever problems there are with how they may play out in practice—grew out of crises, out of the recognition of the need for some basic societal and international legal rules applicable to the actions of governments everywhere, for everyone, at all times, within which the world can operate. Human rights call on us to challenge the distribution of power and to value everyone equally. This requires us not only to interrogate but to address the historical reasons for the economic, social, cultural, and political backdrop to the massive and entrenched systems of inequality that perpetuate in our societies.

By human rights, I mean what the United Nations (UN) means, in that they are internationally agreed upon and are about the relationship between the individual and the state. They are not about what people as people do to one another, and sadly, from a legal perspective, they are also not, at least not yet, about the actions or inactions of multinational corporations like pharmaceutical companies. And human rights law, then, is what the governments of the world have agreed with one another about what their legal obligations are to promote and protect our rights as humans. Obviously, that is a floor and not a ceiling in terms of where we want things to be. Every country in the world, including the United States, has ratified one, some, or all of the human rights treaties, which makes them a common standard across all countries. While the United States has only ratified the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), these are nonetheless legally binding obligations. The international committee that monitor government compliance with CERD has quite recently pronounced on the United States, and made some very helpful points in relation to both COVID-19 and access to abortion services that can be relevant to advocacy moving forward.

Global health is another key concept to define.
Global health moves us past looking at health problems only in relation to our own country, our own city, or our own experiences. Global health is also not about health concerns that are “out there.” It is about the connections between what happens in Los Angeles with what is happening in all parts of the world. Importantly, for context on international organizations and roles, the UN is the primary actor responsible for coordinating collective action in both health and human rights. For health, the key player is the World Health Organization (WHO), which is responsible for setting unified standards for health.

Bringing human rights and health together can happen primarily in three ways. One can look at the impact of health policies and programs on human rights and ask, do those policies burden rights, or do they benefit rights? The second way is to look at the effects of human rights violations and evaluate how these impact health. The third way concerns the interdependence of health and human rights and how they are mutually reinforcing. Essentially, the promotion and protection of both health and human rights are ultimately going to lead to the best outcomes for people's well-being, and conversely, their neglect or violation results in worse outcomes. It is worth noting in this respect that the human rights framework recognizes that it can be considered legitimate to restrict rights for the sake of public health. Interfering with freedom of movement when instituting quarantine or isolation for COVID when the pandemic was just starting is an example of a restriction on rights that could be necessary for the public good and could, therefore, be considered legitimate in public health terms and under international human rights law, so long as it met the following criteria:

- The restriction is provided for and carried out in accordance with the law;
- It is in the interest of a legitimate objective of general interest;
- It is strictly necessary in a democratic society to achieve the objective;
- There are no less intrusive and restrictive means available to reach the same objective; and
- The restriction is not imposed arbitrarily, i.e., in an unreasonable or otherwise discriminatory manner.

Much of what is done in public health relies on law and directives, which can be assessed from both a health and a rights perspective using these criteria.

**COVID-19 as an Example**

Focusing on public health directives requires thinking of what makes sense from a public health perspective but being, nonetheless, attuned to the economic, social, cultural, and political backdrop within which they occur. In the context of COVID, for example, consider physical distancing, the notion that people must remain six feet apart. While this generically makes sense in health terms, what sense this makes for people who live, and spend all aspects of their lives, in extremely overcrowded conditions is unclear. How can one maintain six feet of distance when, for example, you live in a crowded room where people sleep in shifts as there is no room for everyone to lie down at once? Thus, the issue to consider for all medical and public health directives is not only the evidence of effectiveness or what makes sense clinically but also what sorts of resources are needed for these to be relevant and accessible for ALL people, no matter how poor or vulnerable. Much of this, therefore, goes beyond simply the purview of a department of health and requires attention to the broader societal context, including the social and other services that fall within the responsibility of the government.

While all health issues are different, nonetheless, the ways in which public health directives are meant to come down are intended to require a number of steps and things to be put in place. First, there is supposed to be the science and evidence behind the decision (which is a key point we need to think about in terms of what happened with COVID as well as the spate of abortion directives coming down). Then, the decision has to be written out in some form and reviewed, the regulation has to be passed by a body with the authority to do so, resources have to be allocated, the tests or vaccines or services then have to be distributed, and those responsible for implementing the directive have to be trained. In each case, one has to consider what part of government is or should be made responsible for implementation. Is it the health department? Is it the police? Is it the military? Finally, the directive has to be communicated to the general public, and there must be some monitoring and evaluation in place to determine if the directive is having its desired effect.

A wide-ranging set of regulations were passed across the world in the name of COVID, and it is worth considering these from a dual public health and human rights lens to determine their legitimacy in health and rights terms and, ultimately, their effectiveness. Whether it is the detention of thousands of people by the police in crowded cells for ostensibly not complying with the quarantine orders in place or the hundreds of people around the globe charged under new emergency laws passed in the name of COVID that punish people for potential or perceived COVID-19 exposure, each of these directives needs to be reviewed to ensure they were effective in public health terms and, importantly, that they did not result in discriminatory actions taken only against already poor and marginalized people.

A particularly relevant issue that has been raised is the use of phone applications for contact tracing, introduced as part of the COVID response in many places. Ongoing questions need to be raised as to what it means that these data were and are being collected; what is happening with the data gathered; who is it going to; who should have access to this information; and what does it mean for monitoring people's movements and contacts over and above the specifics of COVID? Is it acceptable if the application is now used by governments to generally track people's
personal health status, contacts, and lifestyle choices in the name of public health, even as the virus is no longer an immediate threat? For how long is it acceptable for governments to be storing these data, and how much are they responsible, for example, for safeguarding the data against hackers? And importantly, for all of this, who should decide?

These are only a few of the many issues COVID has raised that must remain central to bringing health and human rights together moving forward.

**Abortion as an Example**

To place what has happened in the United States at the federal level with the Dobbs decision and the spate of actions happening within states in context, it is worth paying attention to what is happening in all parts of the world in terms of legal access. In 2022, close to 75 countries allow abortion essentially on request, with some varieties, and then about 125 countries have some types of restriction but allow abortion, for example, to save the life of the mother, in the case of rape or incest, because of physical or mental health concerns, on broad social or economic grounds, and in relation to fetal viability and impairment. Most countries have been, based on public health evidence, whittling away at their restrictions and moving closer to seeing abortion as a medical procedure (full stop). In fact, over the last 20 years, the majority of the world has been making abortion safer by reducing restrictions, while only the United States, Poland, and El Salvador keep legally making abortion harder to access.

The WHO has recently revised its Safe Abortion Guidance and notes, in particular, as relevant to what is currently happening in the United States, that people should receive care they need without financial hardship, and this includes abortion as a part of universal health coverage; that this is necessary so that people do not have to resort to unsafe abortion; and that on public health grounds there is a need for legal, administrative, political and judicial environments that facilitate quality abortion care.

The data are clear that making abortion less legally accessible does not reduce the number of abortions, it simply reduces the number of safe abortions. Globally, there are already millions of people seeking unsafe abortions, and the resulting morbidities have long been of great concern. If there are already 20 million pregnant people needing (but not always receiving) medical care for complications from unsafe abortion around the world, it is scary to think how much this number will grow in several years with the more recent changes in the United States.

The Center for Reproductive Rights and the Guttmacher Institute have done very important work in tracking the present legal situation in the United States since the Dobbs decision. The range of bans and restrictions is overwhelming, with many states having in place myriad and inconsistent restrictions, with tremendous variability even between states that are geographically close to one another. The legal restrictions in place comprise everything, including: physician and/or hospital requirements; gestational limits; prohibition of the use of public funds and/or of private insurance; the right of refusal by provider or institution; state-mandated "counseling" and waiting periods; mandated parental involvement; Targeted Regulation of Abortion Providers (TRAP) laws that single-out physicians who provide abortion care; and criminalization of self-managed abortion. The list goes on and on, and in each case, the specifics are quite different from state to state, even when a law may have the same name and is ostensibly regulating in the same thing.

Problematic provisions vary from state to state, but they abound, including those that authorize members of the public to sue abortion providers, as well as people who they think have helped others access abortion care. To note, additionally, several states have passed "heartbeat" laws that ban abortion once any cardiac activity can be detected on an ultrasound scan. Those laws would effectively ban abortions at about six weeks of pregnancy, if not before, even as most people are not even aware they are pregnant at that point. Many states have included prison sentences for doctors who perform an abortion. In some states, a person performing an abortion faces a minimum penalty of five years in prison. The maximum penalty is life. Conversely, several states have enshrined the right to access abortion in their state constitutions in order to make explicit that the state cannot deny or interfere with a person's reproductive freedom, including their decision whether or not to have an abortion. The point is simply that it is a crazy time for an individual pregnant person living in the United States. If you are pregnant and seeking an abortion, the variability of what is allowable is incredibly hard to navigate, and I fear it is only getting worse. This state-by-state approach is clearly of great concern for the years to come. All major medical associations in the United States have called out the harms of this approach brought on by the Dobbs decision and the need for safe and legal abortion. And importantly, the CERD has called out the racialized aspects of abortion in this country and specifically called on the federal government to mitigate the risks faced by women seeking an abortion and by health providers assisting them, and to ensure that they are not subjected to criminal penalties. So, this is important, very current, and very useful for advocacy and for action against some of the current complicated legal landscape.

**Moving Forward**

There are many actions being taken these days by governments in the name of public health. I would like to suggest that in each case, whether COVID or abortion or any other health issue, when we hear or read about government-mandated regulations justified in the name of public health, that we interrogate: What was the evidence base for the decision? How is it being
financed? What are its human rights impacts? Who should be responsible for enforcing the law, and with what training and with what resources and support to ensure it is done correctly? And, given the rationale for such measures is ostensibly that they are necessary for health, that the question be asked in each case, how effective is the directive not just in political terms but truly in public health terms?

It is undeniable that human rights matter for public health responses and that they can offer a useful framework for assessment and for action. Specifically, they provide a framework for how we look at and engage with the economic, social, cultural, and political backdrop to these sorts of public health emergencies, and with the use and misuse of law in how these sorts of health issues are addressed. This means, purely at a practical level, ensuring that our responses to health issues seek to optimize both public health and human rights. It is the right thing to do, but it is also the most effective and can lead to better outcomes. As a society, we should not have to keep relearning this whenever there is a new global health crisis.

What will it take to move forward? First, we have to be vigilant in addressing actions taken in the name of public health that have clearly overstepped the bounds of what is actually in the interest of the public’s health. And there is work for all of us here, whatever our discipline. These new harmful COVID laws and abortion restrictions will need to be legally challenged; some of this is starting to happen, but this will need to be a focus in the next few years. And we need to be working with communities to directly address the harmful impacts of these laws on people’s lives, as well as documenting their impacts on health and well-being. Second, as we all know, more health emergencies are right around the corner, so we need to think about what this all means for training: the training of lawyers but also of physicians and folks in public health for how to operate in these challenging environments, as well as the police for how they can minimize harms in carrying out their legal mandates, and for judges, to understand the medical and public health evidence alongside people’s lived experiences as necessary to address the harms of these bad laws and overturn them.

If the last few years have shown us anything, it is that public health directives are increasingly hard to separate from politics. And we need to be vigilant about this and what this means for our work and for our lives. We also need to watch the ways in which the meaning of national security is being recast: what does it mean that health and security have become so intertwined? It is not a reach to say that COVID has allowed the architecture of surveillance and social control to expand in the name of public health. The potential harms are real, and something we need to think about going forward.

And finally, there are a few issues to be addressed in the immediate. First, in terms of COVID, we have to address the inequitable access to COVID-19 vaccines that exists. We cannot pretend COVID is over just because, for many of us in the United States, we are starting to be able to “get back to business.” Vaccines are often thought of as a tool to achieve global equity, and yet this pandemic has shown that many wealthy countries, not just the United States, did not pursue an equity approach to vaccine acquisition and distribution. Further, what is being called vaccine diplomacy became a means of cementing spheres of influence, with rich countries donating vaccines first to the countries they see as strategic partners. It should not even need to be said, but the pandemic will only come to an end if the virus is tackled everywhere in the world, and equitable access to vaccines is essential for this to happen.

Second, in terms of abortion, there is a normative force to the United States’ human rights obligations as concerns access to safe and effective abortion services. Human rights can give legitimacy and solidarity to the kind of social movement action needed to foster political change. There is no question that in this moment, we need new strategies and to build new alliances, and that means moving beyond working in silos, and it means connecting to the range of folks who are engaged in the fight for health equity, not just those who work in our specific domains.

In all of our countries and communities, if we really want to build momentum towards social change, we have to take a hard look at the last few years. To be clear, these issues have always been here, but there is no getting around the long-term effects of all that is happening now in all of our communities, the deepening of the divisions between the haves and the have-nots, and specifically, within this country, the growing differences for health and well-being that exist depending on what state we live in. These inequalities will impact the world for decades to come. There is no getting around it.

On scientific, humanitarian and human rights grounds, we need a major collective effort to create a comprehensive, equitable global approach to addressing health and human rights, based on true global human solidarity—this is not just a nice idea, it is a necessity. And I hope we can work together to help make this a reality.
"Don’t be afraid to make mistakes or get something wrong in law school. It’s how you learn and grow!"

Silgai Mohmand
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“My first tip would be to utilize both professor and fellow office hours. Sometimes professors will explain how they want concepts formatted on an exam if you take the time to ask them outright. Also, while I was a fellow I remember looking forward to students showing up to office hours so I could provide strategies and tricks for the course and final, it was never a burden.
Office hours are a great way to build more personal connections as well.

My second tip would be to never go into the final without having tried a practice exam for that subject. Complete some practice essays under timed conditions so come the final you’re just going through the muscle memory you’ve already developed. Making mistakes in law school is an inevitable part of the process, it’s better to get as many out of the way during practice runs."

Arthur Ramirez
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"Focus on your own process and improvement, and don't compare yourself to others. Put in the work in your classes, but don't forget to enjoy life."

Andrea Rodriguez  
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"A tip I have for law students is to make strong connections with lawyers in the field you aspire to be in. Don't be afraid to reach out to recent graduates or experienced attorneys with questions you may have."

Austin Jones  
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"Follow your passion, and love what you do. Don't be afraid to be a trailblazer."

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